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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume I
(Pages 1 to 480)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

No. 13788—WB

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation; THE EXCHANGE ORANGE PRODUCTS CO., a Corporation; EXCHANGE LEMON PRODUCTS CO., a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTI-TRUST LAWS

Plaintiff Winckler & Smith Citrus Products Co. alleges:

General Allegations

I.

Jurisdiction. This complaint is filed and these proceedings are instituted under the following Acts of Congress and statutes of the State of California:

Section 1 of the Act of Congress of July 2, 1890, Section 2 of the Act of Congress of July 2, 1890,

Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act [15 USCA §§ 1, 2], Section 4 of the Act of Congress of October 15, 1914, Section 16 of the Act of Congress of October 15, 1914, commonly known as the Clayton Anti-Trust Act [15 USCA §§ 15, 26], [3*] Section 2 of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act [15 USCA §§ 13, 13(a)], Sections 16,700 to 16,758 of the California Business and Professions Code, Commonly known as the Cartwright Anti-Trust Law and Sections 17,000 to 17,101, inclusive, of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facilities and the conspiracies and combinations to discriminate in price, services and facilities, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court and elsewhere in California and throughout the United States.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Co. is, and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California.

(b) Plaintiff's Business. Plaintiff is and was a juice canner of By-product fruit, i.e., oranges, lemons and grapefruit, buying the said By-product fruit in Arizona and California, canning the fruit juices in Anaheim, California, and causing the canned juices to be transported intrastate, and interstate throughout the United States. In 1950 and 1951, plaintiff furthermore caused canned citrus fruit juices to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States. [4]

III.

Defendants. (a) California Fruit Growers Exchange (hereinafter referred to as Sunkist) is, and at all times herein mentioned was, a California membership corporation with its principal place of business in the City of Los Angeles, California. It is and was in the business of marketing citrus fruit throughout the United States. Through two or more subsidiary companies it is and was also in the business of canning fruit juices and marketing the said fruit juices throughout the United States.

(b) The Exchange Orange Product Co. (hereinafter referred to as E.O.P.) is, and at all times

herein mentioned was, a California corporation with its principal place of business in the City of Ontario, California, and is and was a wholly owned subsidiary of Sunkist, and is and was engaged in the business of canning and marketing canned fruit juices throughout the United States.

(c) Exchange Lemon Products Co. (hereinafter referred to as E.L.P.) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Corona, California, and is and was a wholly owned subsidiary of Sunkist, and is and was engaged in the business of canning and marketing canned lemon juice throughout the United States.

(d) Treesweet Products Co. (hereinafter referred to as Treesweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California, and is and was a juice canner of By-product fruit, buying the said By-product fruit from Arizona and California, canning the fruit juices in Santa Ana, California, and causing the canned juices to be transported intrastate and interstate into at least all of the states of the United States and the District of Columbia in which plaintiff markets its canned juices. [5] Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) The true names and capacities of the fictitious defendants are unknown to plaintiff. When the true names and capacities are ascertained, plaintiff will move to amend this complaint accordingly.

IV.

Definitions. "Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for the manufacture of single strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satisfactory for, or capable of being absorbed by, the fresh citrus fruit market.

"Single-strength juice" refers to canned natural citrus fruit juice.

"Hot pasteurized concentrate juice" refers to pasteurized concentrated citrus fruit juice.

"Frozen concentrate juice" refers to concentrated citrus fruit juice processed under low temperature and quick frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any co-operative or association such as Sunkist marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry. (a) All citrus fruit marketed [6] in the United States is produced in the United States almost exclusively in the states of California, Florida, Texas and Arizona.

(b) Defendant Sunkist is the largest single citrus fruit marketing organization in the United States. Its only principal competition is from the State of Florida where, however, there is no single dominating agency.

(c) Said defendant markets approximately 70% of the oranges, 90% of the lemons and 60% of the grapefruit produced in California and Arizona and marketed in interstate trade and commerce throughout the United States.

(d) Approximately 25% of the oranges, 99% of the lemons and 15% of the grapefruit, fresh and canned, marketed in the United States, are produced in California and Arizona.

(e) Defendant Sunkist directly and through subsidiaries dominates and controls the citrus fruit industry in California and Arizona.

(f) Plaintiff's existence as a juice canner depends, and at all times herein mentioned depended, upon the purchase by it from the defendant Sunkist of large quantities of By-product fruit. With respect to By-product oranges and prior to 1951, plaintiff, with difficulty, sought out the independent packer and together with purchases from the defendant Sunkist was able to purchase enough By-

product oranges to market its products. However, in 1951, By-product oranges were not available in sufficient quantities from independent packers and, as hereinafter alleged, defendants acted to eliminate plaintiff from the canned orange juice market. Thus plaintiff's sales in all categories of canned citrus fruit juice were reduced by approximately 66% and in the category involving oranges, that is, orange juice and blended juices containing orange juice, plaintiff's sales were reduced by approximately 70%, and in the category of single strength orange juice, plaintiff's sales were [7] reduced by approximately 82%.

(g) Citrus fruit is canned almost exclusively in the states of California, Florida, Texas and Arizona.

(h) Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951 defendants Sunkist, E.O.P. and Treesweet together marketed approximately 50% and 80% in the respective years of canned orange juice produced in California and Arizona and marketed throughout the United States.

(i) Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951 defendants Sunkist, E.L.P. and Treesweet together marketed approximately 65% of the canned lemon juice produced in California and Arizona and marketed throughout the United States.

(j) Defendant E.O.P.'s sole source of supply of By-product fruit has been and is defendant Sunkist.

(k) Defendant E.L.P.'s sole source of supply of By-product fruit has been and is defendant Sunkist.

(l) Plaintiff is informed and therefore alleges upon information and belief that defendant Treesweet's principal, if not exclusive, source of supply of By-product fruit is, and in 1951 was, defendant Sunkist.

VI.

Interstate Commerce. (a) The Citrus Fruit Industry. The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and material in California, Arizona and Texas, the transportation of fresh [8] fruit from Arizona and Texas to California, the shipping of fresh fruit from California to all of states of the United States, the processing and canning of fresh fruit in California, Arizona and Texas, and the shipping of the processed and canned fruit and juices throughout the United States.

(b) Plaintiff, as part of the citrus fruit industry, was and is engaged in interstate trade and commerce among the several states as above de-

scribed. Plaintiff's plant is located in the City of Anaheim, California. Among other things and in the course of purchasing By-product fruit from the defendant, Sunkist, and from others, plaintiff causes the fresh fruit produced in Arizona to be shipped to it by interstate carriers from Arizona to California. Plaintiff then processes and cans the fruit in California and causes the canned fruit juices to be shipped by interstate carriers throughout the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written an wired communications, the assemblage of personnel, property and material in at least fifty cities of the United States, the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiaries in California. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Defendants E.O.P. and E.L.P. were and are engaged in interstate trade and commerce throughout the United States substantially in the same manner as the plaintiff and the defendant, Sunkist.

(e) Defendant Treesweet was and is engaged in interstate trade and commerce throughout the

United States substantially in the same manner as the plaintiff and the defendant, Sunkist, E.O.P. [9] and E.L.P.

VII.

Damages. Prior to 1951, plaintiff enjoyed an extensive and profitable business and had expended in excess of $500,000.00 in promoting and developing its good will, reputation and distribution of its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff has been injured in its business and property, good will, promotions, advertising and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff. When the exact damages shall be ascertained, plaintiff will ask leave to amend this complaint so as to allege said exact and further damages.

VIII.

Threatened Loss and Damage. By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first class juice canner has been seriously and irreparably impaired and injured, and to the unfair and wrongful advantage of the defendants and others;

(b) Plaintiff has been compelled to pay unreasonable and discriminatory prices for By-product fruit to the damage and loss of plaintiff and to the unfair and wrongful advantage of the defendants and others;

(c) Plaintiff is irreparably losing patronage for its products and otherwise continues to be threatened with loss and damage;

(d) Plaintiff is without any plain, speedy or adequate remedy at law; and [10].

Unless the defendants and each of them are temporarily and permanently restrained and enjoined pursuant to pertinent statutes and laws from continuing their unlawful practices and activities as herein alleged, defendants will continue in their wrongful acts and conduct and plaintiff will continue to suffer irreparable loss and damage.

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the general allegations above.

II.

Section 1 of the Sherman Act. All of the defendants each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, and each parent company with each of its subsidiaries

and affiliates, have, for many years last past, in the course of interstate trade and commerce, contracted, combined and conspired with each other unreasonably to restrain and monopolize trade and commerce and pursuant to said contracts, combinations and conspiracies, defendants have in effect unreasonably restrained and monopolized trade and commerce in the production and marketing of citrus fruit and canned fruit juices produced and processed in the State of California and marketed throughout the United States.

III.

Specifications. For many years last past, and particularly since in or about the year 1951 the said defendants contracted, combined and conspired in such manner as to tend to eliminate plaintiff from the canned citrus fruit juice market and particularly from the single strength orange juice market and so as to disable [11] plaintiff from competing with the defendants freely, fairly and reasonably.

Among other things,

(a) Defendant Sunkist refused to sell By-product fruit to plaintiff except at a price which prevented plaintiff from competing with defendants E.O.P., E.L.P., and Treesweet.

(b) Defendants combined, agreed and undertook, directly and indirectly, to have the defendants Treesweet, E.O.P. and E.L.P. purchase By-product fruit from defendant Sunkist substantially below defendant Sunkist's scheduled price for said By-product

fruit so that said defendants could market canned citrus fruit juice and particularly single strength orange juice at a price which plaintiff could not possibly meet.

(c) Defendants combined, agreed and undertook, directly and indirectly, to favor defendants Treesweet, E.O.P., and E.L.P., and in discrimination against plaintiff with respect to the terms of purchase of By-product fruit.

(d) Defendants combined, agreed and undertook, directly and indirectly, to permit defendants Treesweet, E.O.P., and E.L.P. to custom pack fruit juices for them while refusing to permit the plaintiff so to do.

(e) Defendant Sunkist discriminated in favor of defendants Treesweet, E.O.P., and E.L.P and against plaintiff with respect to the terms of purchase of By-product fruit.

(f) Defendants Sunkist, E.O.P., and E.L.P. conducted their business with plaintiff in the most arbitrary manner and with the intent to disable plaintiff from competing in a free and fair market.

Second Cause of Action

I.

Plaintiff realleges with the same force and effect as if [12] herein set forth in full each and every paragraph of the general allegations above and paragraphs II and III of the First Cause of Action herein.

II.

Section 2 of the Sherman Act. All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the citrus fruit industry among the several states and the District of Columbia and have effectuated their monopolization of trade and commerce among the several states and the District of Columbia by doing, among other things, the acts set forth in paragraph III of the First Cause of Action herein.

Third Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the general allegations above.

II.

Section 1 of the Robinson-Patman Act. For many years last past and particularly in 1951, (a) defendants were and they now are engaged in trade and commerce throughout the United States;

(b) In the course of such commerce defendant Sunkist has individually and/or through its wholly owned subsidiaries, the defendants E.O.P. and E.L.P., directly and indirectly, discriminated in price between different purchasers of commodities of like grade and quality, to wit. By-product fruit and particularly oranges for the canning of single strength orange and orange blended juice;

(c) The purchases involved in such discrimina-

tion were in commerce among the several states, the District of Columbia, and the territories of the United States; [13]

(d) The effect of such discrimination was substantially to lessen competition from the plaintiff and tended to create a monopoly in the defend its and to injure, destroy and prevent competition from the plaintiff;

(e) Defendants Sunkist, E.O.P., and/or E.L.P., paid and contracted for the payment of things of value to and for the benefit of its customers, including defendant Treesweet, in the course of such commerce, as compensation or in consideration for services and facilities furnished by and through said customers including defendant Treesweet, in connection with the processing, handling and sale of products and commodities, to wit, canned fruit juices, particularly single strength orange and orange blended juice manufacture, sold or offered for sale by defendants Sunkist, E.O.P., and/or E.L.P., without defendants Sunkist, E.O.P., and E.L.P. making such payment or consideration available on proportionally equal terms to all other customers, including plaintiff, competing in the distribution of such products and commodities;

(f) Defendant Treesweet in the course of such commerce knowingly induced and received discriminations in price above described and which is prohibited by law.

III.

Section 3 of the Robinson-Patman Act. For many years last past and particularly in 1951, and in the

course of said commerce as hereinabove alleged, defendants were parties to, and assisted in, transactions of sale and contracts to sell which discriminated, to their knowledge, against competitors, including plaintiff, of defendants Sunkist, E.O.P., E.L.P.'s purchasers, including defendant Treesweet, in that allowances were granted to the purchasers, including the defendant Treesweet, over and above any allowances available at the time of the tranactions to said competitors, including plaintiff, in respect of sales of goods of like grade, quality and quantity, that is, By-product fruit, [14] particularly oranges.

IV.

Specification. (a) On April 4, 1951, defendant Sunkist published and distributed its Valencia Price Schedule #1-51, effective April 9, 1951, which showed the price per ton, f.o.b. packing house, of Valencia oranges on the basis of pounds of soluble solids per ton;

(b) The number of pounds of soluble solids per ton varies with each run of oranges;

(c) For example, where the number of pounds of soluble solids per ton was 120, the price per ton f.o.b. packing house, pursuant to said Valencia Price Schedule, was fixed by the defendant Sunkist at $40.00;

(d) In 1951 plaintiff purchased from the defendant Sunkist Valencia oranges in accordance with the said price schedule;

(e) In 1951 defendant Treesweet, directly and indirectly, purchased Valencia oranges of like grade and quality as did plaintiff from the other defendants for a price less than one-half fixed by the said schedule of prices and paid by plaintiff.

V.

Further Specification. Plaintiff is informed and therefore alleges upon information and belief that one of the methods used by the defendants in effectuating the price discrimination in favor of the defendant Treesweet (as well as others) and in discrimination against plaintiff was substantially as follows:

Defendants Sunkist and E.O.P. delivered By-product oranges to defendant Treesweet (and others) on consignment under an arrangement whereby these canners produced single-strength orange juice for defendant E.O.P. and for which defendant E.O.P. paid the cost incurred to produce such juice. Defendant Treesweet (and others) were then permitted to purchase the canned orange juice from defendant E.O.P. at approximately $2.30 a case. [15] Thus, after producing and canning the orange juice, defendant Treesweet acquired packed orange juice at a net cost which in substance reflected a cost of the By-product oranges used in such product of less than one-half of the price set forth in defendant Sunkist's said Valencia Price Schedule.

VI.

Further Specification. During the period mentioned in the previous paragraph plaintiff requested of the defendants Sunkist and E.O.P. that it be permitted to make similar transactions as above described with the said defendants, which requests were denied.

Fourth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the general allegations above.

II.

Cartwright Anti-Trust Act. (a) For many years last past in the State of California defendants combined their capital and skill and together acted to create and carry out restrictions in trade and commerce and to prevent competition in the manufacture, making, transportation, sale and purchase of citrus fruit, particularly canned single strength orange juice, and defendants did, (1) create and carry out restrictions in trade and commerce, (2) prevent competition in the manufacture, making, transportation, sale and purchase of said produce and commodities, (3) make, enter into, execute and carry out contracts, obligations and agreements by which they established and settled the price of said produce and commodities so as directly and indirectly to preclude a free and unrestricted competition among themselves and any purchasers in the sale of such produce and commodities, and they did

combine [16] and directly and indirectly united their interests which they had in connection with the sale of such produce and commodities so that the price of the said produce and commodities was affected.

(b) All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the citrus fruit industry, particularly canned single strength orange juice, within the State of California.

III.

Specifications. For many years last past, particularly since in or about the year 1951 the defendants contracted, combined, conspired, monopolized and attempted to monopolize in such manner as to eliminate plaintiff from the canned citrus fruit industry, particularly from the single strength orange and orange blended juice market, and so as to disable plaintiff from competing with the defendants freely, fairly and reasonably within the State of California by doing in intrastate commerce, among other things, the acts described in Paragraphs II and III of the First Cause of Action, Paragraph II of the Second Cause of Action, and Paragraphs II, III, IV, V and VI of the Third Cause of Action, as having been done in interstate commerce.

Fifth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every alle-

gation of the general allegations above and Paragraphs II and III of the Fourth Cause of Action.

II.

Unfair Practices Act. For many years last past, particularly in 1951, and in the State of California, defendants Sunkist, E.O.P., and E.L.P. secretly paid and allowed defendant Treesweet rebates, refunds, commissions and unearned discounts, and secretly extended [17] to defendant Treesweet special services and privileges not extended to all purchasers, including the plaintiff, purchasing upon like terms and conditions, to the injury of plaintiff, which payments and allowances tended to destroy competition.

Wherefore plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this complaint.

2. That the Court issue its preliminary, permanent and perpetual prohibitory and/or mandatory injunction against the defendants California Fruit Growers Exchange, The Exchange Orange Products Co., and Exchange Lemon Products Co., in an appropriate form so as to divorce the ownership and operation of the three companies.

3. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants California Fruit

Growers Exchange, The Exchange Orange Products Co., and Exchange Lemon Products Co., and each of them to offer and sell By-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors including the defendants The Exchange Orange Products Co., Exchange Lemon Products Co., and Treesweet Products Co.

4. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the monopolization of the same hereinabove described, be declared illegal and violative of the antitrust laws of the United States and the State of California.

5. That plaintiff have judgment in the sum of $2,400,000.00 the same being threefold damages under the federal laws which it sustained, or $1,600,000.00, the same being twofold [18] damages under state law, and such further and additional damages as may have been suffered up to the date of the trial and as to which the complaint may be amended.

6. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

7. For all proper relief.

Dated: January 15, 1952.

/s/ BERNARD REICH,
Attorney for Plaintiff.

Duly verified.

Complaint amended December 14, 1954.

[Endorsed]: Filed February 1, 1952. [19]

[Title of District Court and Cause.

No. 13788—WB

PETITION OF RONALD WALKER, TRUSTEE

To the Honorable District Court of the United States for the Southern District of California, Central Division, and to the Honorable William M. Byrne, District Judge:

Ronald Walker, as trustee of the estate of Winckler & Smith Citrus Products Co., Debtor, in the proceeding in this district No. 53,860-C, for his petition to this Honorable Court alleges:

1. By Order dated March 26, 1952, made by District Judge James M. Carter, your petitioner was appointed trustee of the estate of the said debtor.

2. Pursuant to Paragraph 5(h) of the said Order, petitioner has examined into this action which was filed on February 1, 1952, and prior to the petition of the debtor in the said proceeding before Judge Carter, the debtor in that proceeding [204] and the plaintiff in this action being the same party.

3. Petitioner and his attorney, Harry M. Irwin, have examined the records and files in this action and petitioner has particularly examined into the facts as they are reflected in the books, records, documents and papers of the plaintiff, and after consultation with his said attorney he became of the firm opinion that the complaint filed in this action sets forth substantial and meritorious claims which

should be diligently prosecuted. Petitioner became of the further opinion, from his said investigation, that the actionable and wrongful acts of defendants as set forth in the complaint in this action were principal causes for the Chapter X proceeding now pending.

4. Inasmuch as any recovery in this action will accrue to the benefit of the estate of which petitioner is trustee, petitioner obtained leave in the said Chapter X proceeding to file the petition herein. The Order to this effect was made by District Judge Carter the 30th day of April, 1952.

5. Petitioner desires to intervene in this action for the protection, maintenance and preservation of the said debtor and plaintiff's rights and causes of action.

6. Petitioner does not desire to substitute himself in the place and stead of the plaintiff, but merely to intervene in aid of a recovery.

7. Petitioner respectfully proposes that the caption be amended to reflect the intervention and also to reflect the true names of the defendants as given in their papers, all as set forth in the proposed Order submitted herewith.

8. The only party affected by petitioner's desire to intervene, and contemplated by Rule 24(c) of the Federal [205] Rules of Civil Procedure, is the plaintiff. Submitted herewith and as part of the papers herein is the Waiver of Notice properly executed by the attorney for the plaintiff.

9. Petitioner adopts the pleading of the plaintiff heretofore filed.

10. Petitioner has knowledge of the motions pending before this Court for hearing May 5, 1952, requires no further notice of same, and adopts the papers filed by plaintiff.

Wherefore, your petitioner respectfully prays that the Order herewith proposed be made and filed.

Dated this 30th day of April, 1952.

/s/ RONALD WALKER,
Petitioner Ronald Walker,
as Trustee.

/s/ HARRY M. IRWIN,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed May 9, 1952. [206]

[Title of District Court and Cause.]

No. 13788-WB

ORDER PERMITTING INTERVENTION AND AMENDING CAPTION; PETITION OF RONALD WALKER, TRUSTEE; WAIVER OF NOTICE

On application of Harry M. Irwin, attorney for the trustee In the Matter of Winckler & Smith Citrus Products Co., Debtor, No. 53,860-C, this district, and on the records and files in that proceeding and in this action, and on the filing of Waiver of Notice by the plaintiff herein, and due deliberation having

been had thereon, and good cause appearing therefor,

It Is Hereby Ordered as follows:

1. The application of the said trustee to intervene in this action is granted.

2. The above-entitled caption is amended to read as follows: [208]

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation; THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation; EXCHANGE LEMON PRODUCTS COMPANY, a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

Dated this 9th day of May, 1952.

/s/ WM. M. BYRNE,
District Judge.

[Endorsed]: Filed May 9, 1952. [209]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, SUED HEREIN AS THE EXCHANGE ORANGE PRODUCTS CO.

Come now defendant Sunkist Growers, Inc., a corporation, sued herein as California Fruit Growers Exchange, and defendant the Exchange Orange Products Company, a corporation, sued herein as the Exchange Orange Products Co., and for answer to plaintiff's complaint admit, deny and allege as follows: [265]

(For the convenience of the Court the subject headings used in this answer correspond to those used by plaintiff in its complaint.)

Answer to General Allegations of Plaintiff's Complaint

I.

Jurisdiction. Admit that plaintiff's complaint purports to be filed and the proceedings purport to be instituted under the Acts of Congress and Statutes of the State of California set forth in Paragraph I of Plaintiff's General Allegations.

Deny the allegations of the last subparagraph of Paragraph I of Plaintiff's General Allegations, and

particularly deny that defendants here answering or either of them at any time alleged in plaintiff's complaint, or at all, committed any unlawful act or violation as described in plaintiff's complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities, or any conspiracy or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States, or at all.

II.

(a) Plaintiff. Admit the allegations of subparagraph (a) of Paragraph II of Plaintiff's General Allegations. [266]

(b) Plaintiff's Business. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of Paragraph II of Plaintiff's General Allegations except that defendants admit that plaintiff is and was at the times alleged in plaintiff's complaint a juice can-

ner of citrus fruit, canning the fruit juices in Anaheim, California, and that plaintiff bought some of said citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951, plaintiff caused citrus fruit juices to be custom packed for it in the State of Florida.

III.

(a) Defendants. For answer to subparagraph (a) of Paragraph III of Plaintiff's General Allegations, admit that defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's complaint was a California membership corporation with its principal place of business in the City of Los Angeles, California, and allege in that regard that at all of said times said defendant is and was a corporation duly existing under and by virtue of the laws of the State of California, to wit, a non-profit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of non-members to an amount greater in value than such as

are handled by it for its members. Allege that on or about the 8th day of February, 1952, by Certificate of Amendment to its articles of incorporation duly filed with the Secretary of State of the State of California, the name of said [267] corporation was changed to Sunkist Growers, Inc., a certified copy of said Certificate of Amendment being filed in the office of the County Clerk of Los Angeles County on February 11, 1952. Allege that at all times since the filing of said Certificate of Amendment with said Secretary of State the name of said corporation has been and now is Sunkist Growers, Inc. Admit that it is now and was in the business of marketing citrus fruit of its members throughout the United States and elsewhere. Deny that through two or more subsidiary companies it is and was also in the business of canning fruit juices and marketing the said fruit juices throughout the United States, but admit that through defendant, The Exchange Orange Products Company, it is and was at all times mentioned in plaintiff's complaint in the business of canning fruit juices, but allege that such fruit juices so canned by defendant The Exchange Orange Products Company were and are marketed through Sunkist.

(b) For answer to subparagraph (b) of Paragraph III of Plaintiff's General Allegations admit that The Exchange Orange Products Company, sued herein as The Exchange Orange Products Co. (being referred to in plaintiff's complaint and sometimes herein as EOP), is and at all times men-

tioned in plaintiff's complaint was a California corporation. Deny that EOP has, or at any time mentioned in plaintiff's complaint had its principal place of business in the City of Ontario, California, and allege in that regard that at all times mentioned in plaintiff's complaint and at the present time EOP had and now has its principal office for the transaction of the business of the corporation in the County of Los Angeles, State of California. Admit that said defendant is and was a wholly-owned subsidiary of Sunkist, and is and was engaged in the business of canning fruit juices. Deny that EOP is or was at any times mentioned in plaintiff's complaint engaged in the business of marketing canned fruit juices throughout the United States, and allege in that regard that at all of said times the fruit juices canned by EOP were and are marketed through Sunkist, and that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in the products of non-members of Sunkist to an amount greater in value than such as are handled by it for the members of Sunkist.

(c) For answer to subparagraph (c) of Paragraph III of Plaintiff's General Allegations defendants here answering admit that Exchange Lemon Products Company, sued herein as Exchange Lemon Products Co. (Exchange Lemon

Products Company being referred to in plaintiff's complaint and sometimes herein as ELP), is and at all times mentioned in plaintiff's complaint was a California corporation with its principal place of business in the City of Corona, California, and is and was engaged, among other businesses, in the business of canning lemon juice, but deny that said corporation is or at any times mentioned in plaintiff's complaint or at all was a wholly-owned subsidiary or any subsidiary of Sunkist, and allege that the lemon juice canned by ELP is and was marketed through Sunkist.

(d) For answer to subparagraph (d) of Paragraph III of Plaintiff's General Allegations admit that TreeSweet Products Co. (TreeSweet Products Co. being referred to in plaintiff's complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was, among other things, a juice canner of citrus fruit; admit that it buys a portion of said citrus fruit canned by it in California, and that it cans fruit juices in Santa Ana, California; that defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said subparagraph (d) other than the allegations [269] specifically admitted above.

(e) For answer to subparagraph (e) of Paragraph III of Plaintiff's General Allegations de-

fendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations of said subparagraph (e).

IV.

Definitions. Defendants here answering assume that the definitions used in Paragraph IV of Plaintiff's General Allegations are to be restricted to the purposes of plaintiff's complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said Paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

Citrus Fruit Industry. (a) For answer to subparagraph (a) of Paragraph V of Plaintiff's General Allegations, defendants here answering deny that all citrus fruit marketed in the United States is produced in the United States almost exclusively in the States of California, Florida, Texas and Arizona, and allege in that regard that considerable citrus fruit marketed in the United States is produced outside the United States.

(b) For answer to subparagraph (b) of Paragraph V of Plaintiff's General Allegations de-

fendants here answering deny each, every and all the allegations of said subparagraph except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing organization in the United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in [270] processing (including in the term processing the processing of canned single strength orange juice), and allege that Sunkist produces less than 2% of the canned single strength orange juice produced in the United States, and allege that Sunkist has substantial competition from marketing organizations in the State of California, in Florida, in Texas, in Arizona and foreign countries, and further allege in that regard that approximately 90% of the canned single strength orange juice which is processed in the United States is processed in the State of Florida.

(c) For answer to subparagraph (c) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that defendant Sunkist markets approximately 70% of the oranges, 90% of the lemons and 60% of the grapefruit produced in California and Arizona and marketed in interstate trade and commerce throughout the United States, and allege in that regard that figures are not available from which defendants can determine the percentage of oranges, lemons and grapefruit produced in California and Arizona, and marketed in interstate trade and commerce throughout the United States.

(d) For answer to subparagraph (d) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that approximately 25% of the oranges, 99% of the lemons and 15% of the grapefruit, fresh and canned being considered together, marketed in the United States are produced in California and Arizona, and allege in that regard that figures are not available from which defendants can determine the percentage of oranges, lemons and grapefruit, fresh and canned being considered together, marketed in the United States which are produced in California and Arizona.

(e) This subparagraph (e) in plaintiff's complaint was stricken by order of court.

(f) For answer to subparagraph (f) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that [271] plaintiff's existence as a juice canner depends, or at any time mentioned in plaintiff's complaint depended, upon the purchase by it from defendant Sunkist of large quantities, or any quantity, of citrus fruit. Admit and allege that with respect to oranges both prior to 1951, during said year and since said time, plaintiff with purchases made from defendant Sunkist was able to purchase enough by-product oranges to market its products. Deny that plaintiff had difficulty seeking out the independent packer or purchasing enough by-product oranges from independent packers and defendant Sunkist to market its products. Deny that in 1951 or at any other time or times whatsoever by-product oranges were not

available to plaintiff in sufficient quantities from independent packers or that defendants, or either of them, acted to eliminate plaintiff from the canned orange juice market. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation in said subparagraph (f) that plaintiff's sales in all categories of canned citrus fruit juice were reduced by approximately 66%, or that in the category involving oranges, namely orange juice and blended juices containing orange juice, plaintiff's sales were reduced by approximately 70% or that in the category of single strength orange juice plaintiff's sales were reduced by approximately 82%. Defendants here answering allege that plaintiff's sales in the categories mentioned in subparagraph (f) of paragraph V were not reduced in any manner whatsoever by any acts of defendants here answering, or either of them.

(g) For answer to subparagraph (g) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that citrus fruit is canned almost exclusively in the States of California, Florida, Texas and Arizona, and allege in that regard that citrus fruit is also canned elsewhere in various parts of the world.

(h) For answer to subparagraph (h) of Paragraph V of [272] Plaintiff's General Allegations defendants here answering deny that in 1950 and 1951 defendants Sunkist, EOP and TreeSweet together marketed approximately 50% and 80% in the

respective years of canned orange juice produced in California and Arizona and marketed throughout the United States, and allege in that regard that defendant EOP was not during said years nor is it at the present time engaged in the marketing of canned orange juice, and that the orange juice canned by EOP was and is marketed through Sunkist; that figures are not available from which defendants can determine the percentage of canned orange juice produced in California and Arizona and marketed by Sunkist throughout the United States, and defendants here answering are without knowledge as to the amount or percentage of canned orange juice produced in California and Arizona and marketed throughout the United States by TreeSweet during said years.

(i) For answer to subparagraph (i) of paragraph V of plaintiff's General Allegations defendants here answering deny that in 1950 and 1951 defendants Sunkist, ELP and TreeSweet together marketed approximately 65% of the canned lemon juice produced in California and Arizona and marketed throughout the United States, and allege that figures are not available from which defendants can determine the percentage of canned lemon juice produced in California and Arizona and marketed by Sunkist throughout the United States, and defendants here answering are without knowledge as to the amount and percentage of canned lemon juice produced in California and Arizona and marketed throughout the United States by TreeSweet during said years.

(j) Admit the allegations of subparagraph (j) of paragraph V of plaintiff's General Allegations.

(k) Deny the allegations of subparagraph (k) of paragraph V of plaintiff's General Allegations, and allege in that connection that the sole source of supply of by-product fruit for ELP is its grower-shareholders, who are members of Sunkist. [273]

(l) Defendants here answering are without knowledge whether TreeSweet's principal source of supply of by-product fruit was in 1951 or is defendant Sunkist, or whether defendant Sunkist is or was its exclusive source of supply of said by-product fruit.

VI.

Interstate Commerce. (a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry includes the matters set forth in said subparagraph, and allege in that regard that the State of Florida, not mentioned by plaintiff, is a very important factor in the citrus fruit industry, particularly the canned single strength orange juice field, canning approximately 90% of all single strength orange juice canned in the United Sates.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations defendants here answering are without knowledge as to the allegations contained in said subparagraph except that defendants here answering admit that plain-

tiff's plant is located in the City of Anaheim, California, and that in the course of purchasing by-product fruit from defendant Sunkist plaintiff occasionally has caused grapefruit but not oranges produced in Arizona to be shipped to it by interstate carriers from Arizona to California, and that it processes the fruit and cans the juice in California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations defendants here answering admit said allegations except the allegations regarding the transportation of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiaries in California, and allege in that regard that the only transportation of fresh fruit from Arizona to plants of defendant Sunkist in California is a small amount to its wholly owned subsidiary EOP. [274]

(d) Deny the allegations contained in subparagraph (d) of paragraph VI of plaintiff's General Allegations.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation that defendant Tree-Sweet was and is engaged in interstate trade and commerce throughout the United States substantially in the same manner as plaintiff is alleged to have been in plaintiff's complaint, and as defendants Sunkist, EOP and ELP are alleged to have been in plaintiff's complaint.

VII.

Damages. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph VII of plaintiff's General Allegations that prior to 1951 plaintiff had expended in excess of $500,000 in promoting and developing its good will, reputation and distribution of its products. Deny that prior to 1951 or at any other time or times plaintiff enjoyed an extensive or a profitable business; deny that by reason of any act or conduct of defendants here answering or either of them plaintiff has been injured in its business or property or good will or promotions or advertising or at all, or that it has suffered loss of earnings in the sum of $800,000 or any other sum whatsoever, or that it will suffer any damage in the future in an amount at this time unknown to plaintiff or at all by any act or conduct of defendants here answering or either of them as alleged in plaintiff's complaint or otherwise.

VIII.

Threatened Loss and Damage. Deny each, every and all the allegations of paragraph VIII of plaintiff's General Allegations. [275]

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's First Cause of Action defendants here answering incorporate herein with the same force and effect as if

herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act. Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications. Deny the allegations of paragraph III of plaintiff's First Cause of Action.

Answer to Second Cause of Action of Plaintiff's Complaint

XII.

For answer to paragraph I of plaintiff's Second Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act. Deny the allegations of paragraph II of plaintiff's Second Cause of Action.

Answer to Third Cause of Action of Plaintiff's Complaint

XIV.

For answer to paragraph I of plaintiff's Third Cause of [276] Action, defendants here answering

incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XV.

Section 1 of Robinson-Patman Act. For answer to paragraph II of plaintiff's Third Cause of Action, deny each, every and all of the allegations contained and set forth in said paragraph except that defendants here answering admit and allege that defendant Sunkist is now and was engaged in trade and commerce throughout the United States and foreign countries.

XVI.

Section 3 of the Robinson-Patman Act. Deny the allegations of paragraph III of plaintiff's Third Cause of Action.

XVII.

Specification. For answer to paragraph IV of plaintiff's Third Cause of Action defendants here answering admit the allegations of subparagraphs (a) to (d), inclusive, of said paragraph IV, and deny the allegations of subparagraph (e) of paragraph IV of plaintiff's Third Cause of Action.

XVIII.

Further Specification. For answer to paragraph V of plaintiff's Third Cause of Action defendants here answering deny each, every and all of the allegations of said paragraph except that they admit and allege as follows:

(a) Admit and allege defendant EOP delivered oranges to defendant TreeSweet on consignment under arrangements whereby defendant TreeSweet produced single strength canned orange juice for defendant EOP, and defendant EOP paid the costs incurred to produce such juice.

(b) Admit and allege defendant TreeSweet was under the arrangement permitted to purchase from said canned juice processed [277] by it its canned orange juice requirements from Sunkist at Sunkist's published price in effect at the time of purchase, less certain discounts and allowances which were reasonable and customary in the trade and which were and are available on proportionally equal terms to all purchasers desiring the same and having acceptable credit standing.

(c) Admit and allege that similar arrangements were made on proportionally equal terms when oranges were available with other processors having processing standards of like grade and quality to those of TreeSweet and who had accepted credit standing.

XIX.

Further Specification. For answer to paragraph VI of plaintiff's Third Cause of Action defendants here answering admit that during the period mentioned in paragraph V of plaintiff's Third Cause of Action plaintiff through its president, Winckler, requested by telephone of defendant EOP that it be permitted to make a transaction similar to that made with defendant TreeSweet but that

such requests were not granted for good and sufficient business reasons. Deny each, every and all of the allegations of said paragraph VI not herein specifically admitted.

Answer to Fourth Cause of Action of Plaintiff's Complaint

XX.

For answer to paragraph I of plaintiff's Fourth Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XXI.

Cartwright Antitrust Act. Deny the allegations of paragraph II of plaintiff's Fourth Cause of Action. [278]

XXII.

Specifications. Deny the allegations contained in paragraph III of plaintiff's Fourth Cause of Action and in connection with the acts alleged in said paragraph defendants here answering incorporate by this reference their answer contained in paragraphs X and XI of their answer to plaintiff's First Cause of Action, and in paragraph XIII of their answer to plaintiff's Second Cause of Action, and paragraphs XV, XVI, XVII, XVIII and XIX of their answer to plaintiff's Third Cause of Action as fully as though herein set forth in full.

Answer to Fifth Cause of Action of Plaintiff's Complaint

XXIII.

For answer to paragraph I of plaintiff's Fifth Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XXIV.

Unfair Practices Act. Deny the allegations of paragraph II of plaintiff's Fifth Cause of Action.

For a Separate, Distinct and Affirmative Defense to Plaintiff's Complaint and to the General Allegations and to Each and Every Cause of Action in Said Complaint defendants here answering allege plaintiff's complaint and the General Allegations and the First, Second, Third, Fourth and Fifth Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering, or either of them.

For a Second Separate, Distinct and Affirmative Defense to the Fourth and Fifth Causes of Action in Said Complaint, defendants [279] here answering allege that the court lacks jurisdiction over the subject matter of the said purported Causes of Action, and each of them.

Wherefore, defendants here answering pray that plaintiff take nothing by its action, that defendants

here answering have judgment for their costs incurred herein against plaintiff and intervener, and for such other relief as may to the Court seem meet and proper in the premises.

FARRAND & FARRAND,
GEORGE E. FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants
Here Answering.

Affidavit of service by mail attached.

[Endorsed]: Filed May 26, 1952. [280]

[Title of District Court and Cause.]

No. 13788-WB

INTERROGATORIES PROPOUNDED TO PLAINTIFF AND INTERVENER BY DEFENDANTS SUNKIST GROWERS, INC., THE EXCHANGE ORANGE PRODUCTS COMPANY AND TREESWEET PRODUCTS CO.

* * *

You and Each of You Please Take Notice that you are required to answer the following interrogatories within 15 days after service of these inter-

rogatories upon you, separately and fully, in writing and under oath:

In order to avoid unnecessary duplication these interrogatories are propounded by defendants Sunkist Growers, Inc., The Exchange Orange Products Company and by defendant TreeSweet Products Co.

While defendant Exchange Lemon Products Company does not join herein, we are advised that on any interrogatories to be propounded by it it will not duplicate the matters covered herein. [458]

* * *

Dated June 12, 1952.

FARRAND & FARRAND,
GEORGE E. FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

O'MELVENY & MYERS,
PIERCE WORKS,
WILLIAM W. ALSUP,
BENNETT W. PRIEST,

By /s/ WILLIAM W. ALSUP,
Attorneys for Defendant
TreeSweet Products Co.

[Endorsed]: Filed June 16, 1952. [483]

[Title of District Court and Cause.]

No. 13788-WB

ORDER FOR PRODUCTION OF DOCUMENTS REQUESTED IN MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 34, AND GRANTING PLAINTIFF'S MOTION TO SUPPRESS INTERROGATORIES OF DEFENDANTS SUNKIST, E.O.P. AND TREESWEET

The motion of defendant Exchange Lemon Products Company for production of documents under Rule 34 and the motion of plaintiff and intervener to suppress the interrogatories served by defendants Sunkist Growers, Inc., The Exchange Orange Products Company and TreeSweet Products Co., came on regularly for hearing in Court Room No. 4 of the above-entitled court before Honorable William M. Byrne on the 8th day of September, 1952; Exchange Lemon Products Company appearing by Clayson, Stark & Rothrock, Pope, Ballard & Loos, Donald D. Stark of counsel, Winckler & Smith Citrus Products Co., and Ronald Walker, trustee, appearing by their counsel, Bernard Reich, Sunkist Growers, Inc., and The Exchange [646] Orange Products Company appearing by Farrand & Farrand, Ross C. Fisher and Knox Farrand of counsel, and TreeSweet Products Co., appearing by O'Melveny & Myers, Bennett W. Priest of counsel; and the Court having read the pleadings and affidavits

on file and heard the argument of counsel, and good cause appearing:

It Is Hereby Ordered that plaintiff Winckler & Smith Citrus Products Co., and intervener Ronald Walker, produce the following documents for the period of April 1, 1949, to the date of filing of the complaint. The said documents shall be made available in normal business hours during the week commencing Monday, October 13, 1952, at the plaintiff's office in Anaheim, California, and plaintiff and intervener shall permit the defendant Exchange Lemon Products Company to inspect said documents and have the same photographed or otherwise copied: [647]

* * *

12. The books and records showing the tests made by plaintiff's laboratory and the results thereof, with respect to citrus fruit and citrus products.

13. Books and records showing one or more of the following:

(a) Inspection of a citrus product of plaintiff by a Government agency or by any quality control or analysis agency other than plaintiff's laboratory,

(b) Date of each such inspection,

(c) Results of each such inspection,

(d) Product inspected,

(e) Steps taken to meet or satisfy inspection standards, if any. [649]

* * *

It Is Further Ordered that defendants Sunkist Growers, Inc., The Exchange Orange Products Company, and TreeSweet Products Co., shall be afforded an opportunity to inspect said books at the said time and place and to photograph or copy the same and be bound by this order to the same extent as defendant Exchange Lemon Products Company.

It Is Further Ordered that all requests for documents contained in the said motion under Rule 34 and not herein expressly ordered are denied without prejudice to their renewal, on good cause shown, after the documents herein ordered to be produced have been examined and analyzed and after conference and discussion among counsel for the respective parties.

It Is Further Ordered that the motion of plaintiff and intervener to suppress the interrogatories served by defendants Sunkist Growers, Inc., The Exchange Orange Products Company, and TreeSweet Products Co., be granted and said interrogatories are hereby suppressed in their entirety, without prejudice to the renewal thereof in whole or in part after the documents herein ordered to be produced have been examined and analyzed by said defendants and after conference and discussion among counsel for the respective parties.

Dated October 30, 1952.

/s/ WILLIAM M. BYRNE,
District Judge.

[Endorsed]: Filed October 30, 1952. [650]

[Title of District Court and Cause.]

No. 13788—WB

NOTICE OF MOTION BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

Please Take Notice

That the defendant Exchange Lemon Products Company will move before the Honorable William M. Byrne at his court room in the United States Post Office and Courthouse Building, Temple and Spring Streets, City of Los Angeles, State of California, on the 23rd day of March, 1953, at 9:45 o'clock in the forenoon of that [682] day, or as soon thereafter as counsel can be heard.

That, pursuant to Rule 37 of said Rules of Civil Procedure:

(a) It shall be taken to be established for the purposes of this action that, according to the laboratory records of plaintiff, the citrus products produced and offered for sale by plaintiff during the period April 1, 1949, to the filing of the complaint were of an inferior quality with respect to flavor, per cent of soluble solids, acidity, and sugar content; and

(b) Neither plaintiff nor intervener may introduce in evidence in this action any laboratory reports of tests, made between April 1, 1949, and the date of filing of the complaint, of plaintiff's citrus products, or documents or testimony concerning or

pertaining to such reports or to the contents of any such reports; and

* * *

Dated March 10, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE, BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Co.

Affidavit of service by mail attached.

[Endorsed]: Filed March 10, 1953. [683]

[Title of District Court and Cause.]

No. 13788—WB

STATEMENT OF REASONS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

Grounds of Motion

1. An order was entered by this court on October 30, 1952, after briefs and oral arguments, which directed plaintiff and intervener to produce for inspection and copying by defendant Exchange Lemon Products Company, at plaintiff's office in Anaheim, California, during normal business hours

and during the week commencing October 13, 1952, the following for the period April 1, 1949, to the date of filing of the complaint in this action:

> 12. "The books and records showing the tests made by plaintiff's laboratory and [685] the results thereof, with respect to * * * citrus products."

2. Said books and records were not produced as directed by said order, and have not yet been produced, as stated in the attached affidavit of Donald D. Stark.

3. Subsequent to said order and said week of October 13, 1952, counsel for defendant Exchange Lemon Products Company requested counsel for plaintiff and counsel for intervenor to produce said books and records and each of them refused to do so, as stated in the attached affidavit of Donald D. Stark.

* * *

Dated March 10, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed March 10, 1953. [686]

[Title of District Court and Cause.]

No. 13788—WB

PLAINTIFF AND INTERVENER'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY (WITH OBJECTIONS TO CERTAIN OF THE INTERROGATORIES)

Plaintiff and intervener herewith submit their answers and objections to interrogatories propounded by defendant Exchange Lemon Products Company.

These answers are based on knowledge presently available.

Plaintiff and intervener have not completed their discovery and reserve the right to revise and amend their answers a reasonable time before trial. [697]

Interrogatory 1. With respect to the allegations of lines 9 through 18, page 2, of the complaint, that certain "unlawful" acts, "violations," a "monopoly," "attempts to monopolize," "combinations and conspiracies to restrain trade," a "discrimination" and "combinations and conspiracies to discriminate," and "unlawful acts done in pursuance thereof" were "conceived, carried out, made effective and performed, in part, within this District of the Court and elsewhere in California and throughout the United States," state each act performed by

each defendant, and when and where performed, in conceiving, carrying out, making effective, and performing the things alleged, except acts alleged elsewhere in the complaint.

Answer. In addition to the acts alleged in the complaint, the defendants combined and conspired to fix prices of canned fruit juices, among other things, by the device of fruit processing [698] agreements.

* * *

Dated: March 12, 1953.

BERNARD REICH, and
HARRY M. IRWIN,

By /s/ BERNARD REICH,
Attorneys for Plaintiff and Intervener.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 13, 1953. [750]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN OPPOSITION TO MOTION UNDER RULE 37

* * *

7. As I wrote to the attorney for the moving defendant, I committed an error at the time of the

hearing as I did not notice that the item included "citrus products" as well as "citrus fruit."

8. My error came about in this way: Since the price of the by-product fruit depended upon laboratory tests of both Sunkist and plaintiff, and if I was entitled to the laboratory tests of Sunkist, the defendants were entitled to the laboratory tests of plaintiff—but only as to the by-product fruit. The complaint did not raise any question with respect to which the laboratory tests of the products as distinguished from the fruit would be material. Furthermore, there was nothing [755] in the pleadings of the defendant or in its moving affidavit which would make the laboratory tests of the products material. It did not occur to me therefore when I stipulated to item 14 that I was stipulating to the laboratory tests of the citrus products in addition to the laboratory tests with respect to the citrus fruit.

9. Because of my error, and the mental omission in my mind, the records concerning the laboratory tests of the products were not made available to the defendants. It was only after counsel for the moving defendant herein brought the matter to my attention that I went back to the item and to the order of this Court. Furthermore, I might have waived my objection to the materiality and relevance of the material were it not that the trustee and intervener herein advised me that the laboratory tests of the products would disclose confidential formula and

that they could not consent to the production unless the order was reaffirmed by the Court. It was then that I offered to make application to this Court to be relieved of that part of the order which had been entered upon by stipulation. However, as indicated above, I had every reason to believe that the defendants were going to require additional material, which they had a right to do under the order, and bring up the subject of this particular item at the same time. Instead the moving defendant raises the question under the punitive Rule 37.

10. It is respectfully submitted that the moving defendant's motion is ill conceived. Under paragraph (a) this defendant asks that it shall be taken to be established that according to plaintiff's laboratory records the citrus products offered for sale were of an inferior quality with respect to flavor, etc. This is apparently proposed in [756] accordance with Rule 37 (b) (2) (i) which provides that designated facts shall be taken to be established "in accordance with the claim of the party obtaining the order." But where has the party obtaining the order claimed that the citrus products were of an inferior quality, etc.?

11. As to Paragraph (b) of this defendant's motion which asks that neither plaintiff nor intervener introduce in evidence any of the laboratory reports, etc., I know of no issue, as I have already indicated, on which these reports would be material. This

points up the objection which I make to the production of these laboratory tests in the first place. [757]

* * *

/s/ BERNARD REICH,

[Endorsed]: Filed March 16, 1953. [758]

[Title of District Court and Cause.]

No. 13788—WB

REPLY MEMORANDUM BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY RE MOTION UNDER RULE 37

I.

Plaintiff and Intervener Have Failed to Establish Substantial Justification for Refusal to Comply With the Court's Order to Produce.

In their answering memorandum, plaintiff and intervener state that there was substantial justification for their failure and refusal to produce the laboratory analyses of citrus products in compliance with the order of this court. This bare assertion of the existence of substantial justification is wholly unspported and, in fact, is refuted by the facts set forth in the affidavit of their counsel.

No question is raised but that the court's order requiring [775] the production of "books and records showing tests made by plaintiff's laboratory

and the results thereof, with respect to * * * citrus products" described in clear and unequivocal language the books which plaintiff and intervener have refused to produce.

The only objection which is given any definite form in counsel's affidavit is a claim that the laboratory analyses of products are not material. Thus, at lines 12 and 13 of page 5 of counsel's affidavit, reference is made to the fact that he might have "waived his objection to the materiality and relevance of these records" but for certain matters. Actually, there is no question now before this court regarding the waiver or non-waiver of such an objection. The objection has already been made by plaintiff and intervener (Plaintiff and Intervener's Supplemental Memorandum in Opposition to Defendant Exchange Lemon Products Company's Motion Under Rule 34, dated August 13, 1952, page 7, lines 26-27). The court's order, after full hearing on the objections, directed production of the records in question.

Petitioner, in effect, asks this court to ignore the extensive pleadings which were filed in connection with the original motion under Rule 34, and the lengthy argument presented on objections thereto, as well as the court's own order granting the motion. Plaintiff and intervener apparently seek to have the court start all over again, in the hope that some other result might be attained. It is submitted that this refusal to accept and comply with the clear and unambiguous terms of this court's decision is clearly

action without justification and the solicitation of "the court's ruling as to the validity of plaintiff and intervener's objections to the production of citrus products tests" is a frivolous reassertion of an objection already presented in due course and overruled by the court. [776]

II.

Plaintiff and Intervener Had Full Notice of the Objectives of Item 14 in Defendant Exchange Lemon Products Company's Motion Under Rule 34.

In the affidavit of counsel (page 4, line 32, to page 5, line 2) it is stated that "there is nothing in the pleadings of the defendant or in its moving affidavit which would make the laboratory tests of products material." It is submitted that counsel has failed to give sufficient study to the affidavit and statement in support of the motion under Rule 34 which was filed by Exchange Lemon Products Company.

The affidavit of Melville C. Williams (page 4, lines 10-12) identifies the documents sought by Item 14 of that motion by reference to the testimony of plaintiff's president as follows:

> "The laboratory of Plaintiff checked the ratio of citrus acid, pulp content of juice, and quality of the finished juice (Tr. 19-20)." (Emphasis added.)

In its statement in support of its motion under Rule 34 (page 8, lines 14-23) defendant Exchange

Lemon Products Company made the following comment relative to the request for laboratory analyses:

> "Paragraphs 14, 15 and 16 of the motion ask for laboratory tests, government inspection records, and correspondence with customers and brokers pertaining to the quality of the fruit used by Plaintiff and the quality of Plaintiff's products. Plaintiff has alleged in paragraph VIII(a) of the complaint that it is a first-class juice canner. It is essential to determine whether it used first-class fruit and manufactured a first-class product. If the product was not satisfactory [777] the damages claimed by Plaintiff may have resulted from this fact rather than from any acts of Defendants." (Emphasis added.)

Plaintiff and intervener were thus put on notice that, of all of the documents requested in Items 14, 15 and 16 of the motion under Rule 34, the tests relating to quality of the product carry the highest materiality and were relevant to the specific allegation of the complaint. It is therefore submitted that counsel for plaintiff and intervener is in no position to suggest that there is nothing to indicate the materiality of the documents sought. Contrary to counsel's assertion that he desires to be relieved from an unfortunate stipulation (Affidavit of Reich, page 3. line 30), he is seeking relief from a solemn order of this court granting a meritorious request to which only the most perfunctory objection was

timely raised, and that objection having been expressly waived in open court. [778]

* * *

Dated March 19, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant, Exchange Lemon Products Co.

Affidavit of service by mail attached.

[Endorsed]: March 20, 1953. [780]

[Title of District Court and Cause.]

No. 13788-WB

DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY'S NOTICE OF WITHDRAWAL OF MOTION UNDER RULE 37

In accordance with the Court's instructions at the hearing on March 30, 1953, notice is hereby given to the Court that the records were produced by plaintiff and intervener and made available to defendant Exchange Lemon Products Company for

photocopying. The said motion has accordingly become moot and is hereby withdrawn.

Dated: April 17, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE, BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed April 18, 1953. [802]

[Title of District Court and Cause.]

No. 13788 C

ORDER GRANTING MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

The motion of Defendant Exchange Lemon Products Company Under Rule 37 to compel Plaintiff and Intervener to further answer certain interrogatories, came on regularly to be heard in the above-entitled court before Honorable James M. Carter on the 8th and 11th days of March, 1954; Exchange Lemon Products Company appearing by

Clayson, Stark & Rothrock and Pope & Ballard, Donald D. Stark and Melville C. Williams of counsel, Winckler & Smith Citrus Products Co. and Ronald Walker, Trustee, appearing by Bernard Reich and Harry M. Irwin; and the Court having read the pleadings and supporting papers and heard the arguments of counsel, and good cause appearing: [1037]

It Is Hereby Ordered that plaintiff and intervener shall answer separately and fully in writing, Interrogatories Nos. 15, 16, 25, 26, 27 and 32 of the interrogatories propounded by defendant Exchange Lemon Products Company on or about December 26, 1952; provided, however, that the time for serving said answers on defendant Exchange Lemon Products Company be postponed until Plaintiff and Intervener have completed their discovery of documents pursuant to the stipulation and order on their motion under Rule 34, the date for said answers to be fixed by stipulation of counsel, or on application to the Court by either party.

It Is Further Ordered that the alternative relief sought by defendant Exchange Lemon Products Company in said motion

(a) Striking certain words from page 12 of the complaint; and

(b) allowing attorneys' fees and expenses in connection with said motion under Rule 37, is hereby denied.

Dated May 10, 1954.

/s/ JAMES M. CARTER,
Judge.

Approved as to form in accordance with Local Rule 7 (a).

CLAYSON, STARK &
ROTHROCK,
POPE & BALLARD,

By /s/ DONALD D. STARK,
Attorneys for Defendant, Exchange Lemon Products Company.

BERNARD REICH,
HARRY M. IRWIN,

By /s/ BERNARD REICH,
Attorneys for Plaintiff and Intervener.

[Endorsed]: Filed May 10, 1954. [1038]

In the United States District Court. Southern District of California, Central Division

No. 53,860—C

In the Matter of:

WINCKLER & SMITH CITRUS PRODUCTS CO.,

Debtor.

No. 13,788—C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

NOTICE OF HEARING; MOTION FOR LEAVE TO COMPROMISE; PETITION

Please Take Notice that the Hearing on the Motion and Petition will be had in the above-entitled Court in the courtroom of the Honorable James M. Carter, District Judge, on the 19th day of July, 1954, at 10:00 a.m.

/s/ BERNARD REICH,
Attorney for Plaintiff and Intervener.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1061]

[Title of District Court and Causes.]

Nos. 53,860-C and 13,788-C

MOTION FOR LEAVE TO COMPROMISE

Comes now Winckler & Smith Citrus Products Co., plaintiff and debtor, and Ronald Walker, trustee, and move the Court for an order granting said party leave to compromise the action against the defendant TreeSweet Products Co. only, and on the terms set forth in the petition herein.

/s/ BERNARD REICH,
Attorney for Plaintiff and Intervener.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1062]

[Title of District Court and Causes.]

Nos. 53,860-C and 13,788-C

PETITION

Winckler & Smith Citrus Products Co., for its petition, alleges:

1. The defendant TreeSweet Products Co., in Action No. 13,788-C, has offered to pay $2500.00 in compromise of the said action.

2. Petitioner's President, Nicholas J. Winckler, and the Trustee, Ronald Walker, have indicated their assent subject to the approval of the [1063] Court.

3. It is proposed that in consideration of the said sum a covenant not to sue further be delivered to the said defendant.

It is proposed also that the discovery heretofore had of the said defendant remain as binding as if the said defendant remained in the case.

4. The inducement to make the said settlement on the part of the plaintiff, intervener and trustee is that the said sum shall be used to prosecute the said action against the remaining defendants.

5. It is proposed that the covenant and stipulation between plaintiff, intervener and trustee on the one hand and the defendant TreeSweet Products Co. on the other shall be submitted to the Court for its approval and order.

6. Petitioner contemplates an order directing that the said defendant TreeSweet Products Co. pay the said $2500.00 to the Trustee, that the Trustee will pay to Bernard Reich such sum as is fixed by the Court in a companion petition for his legal services rendered, and that the balance of the said $2500.00 be earmarked by the Trustee, exclusively for the prosecution of the said anti-trust action.

Dated: May 27, 1954.

WINCKLER & SMITH CITRUS PRODUCTS CO. and RONALD WALKER,

By /s/ RONALD WALKER,
Plaintiff, Intervener and
Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff and Intervener;

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed July 2, 1954. [1064]

In the United States District Court, Southern District of California, Central Division

No. 13,778-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

ORDER APPROVING COMPROMISE OF ACTION No. 13,788-C AS AGAINST DEFENDANT TREESWEET PRODUCTS CO.

Winckler & Smith Citrus Products Co., plaintiff and debtor, and Ronald Walker, trustee, having moved for leave to compromise the action in No. 13,788-C as against the defendant TreeSweet Prod-

ucts Co., a corporation, only, and the hearing having been had thereon on the 19th day of July, 1954, in this Court, Bernard Reich, attorney for plaintiff; Harry M. Irwin, attorney for trustee and intervener, and Jack Stutman, attorney for the debtor, all appearing in support of the motion, and no one appearing in opposition, and the Court having given due deliberation to the motion, now then [1070]

It Is Hereby Ordered:

1. The motion is granted and the compromise with defendant TreeSweet Products Co., a corporation, in the sum of $2500 is approved.

2. Pursuant to said compromise defendant TreeSweet Products Co. is directed to pay to the trustee, Ronald Walker, the sum of $2500 upon receipt by it of the Covenant Not to Sue duly executed.

3. The trustee shall deposit said sum in a separate bank account to be used to prosecute the action in No. 13,788-C and otherwise as directed by the Court, including compliance with any order of the Court to pay to Bernard Reich and/or Harry M. Irwin attorneys fees, if any, hereafter fixed. The trustee shall not expend in excess of $1500.00 of said $2500.00 in prosecution of action No. 13,788-C without further order of this Court.

4. This order is made without prejudice to the prosecution of the action in No. 13,788-C against the defendants other than TreeSweet Products Co., and with respect to defendants other than Tree-

Sweet Products Co. without prejudice to the plaintiff in the use of discovery already had therein.

Dated this 28th day of July, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed July 29, 1954. [1071]

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 24, 1954

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff: Harry M. Irwin, for intervening plaintiff Ronald Walker; William C. Dixon, Spec. Counsel for intervening plaintiff Ronald Walker.

Counsel for Defendants: Ross C. Fisher, for defendants Sunkist and Exchange Orange; Melville Williams, for defendant Exchange Lemon.

Proceedings:

For pretrial hearing.

Court and counsel confer relative to the issues, etc.

On motion of Attorney Dixon, it is ordered that plaintiff may file an amended complaint by December 24, 1954, and that defendants may have 30 days

from service thereof within which to move or plead thereto.

EDMUND L. SMITH,
Clerk;

By L. B. FIGG,
Deputy Clerk. [1103]

In the United States District Court, Southern District of California, Central Division

Case No. 13,788-C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation; THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation; EXCHANGE LEMON PRODUCTS COMPANY, a Corporation, and TREESWEET PRODUCTS COMPANY, a Corporation,

Defendants.

AMENDED COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTI-TRUST LAWS

Plaintiff, Winckler & Smith Citrus Products Company, alleges:

General Allegations

I.

Jurisdiction. This amended complaint is filed and these proceedings are instituted under the following Acts of Congress and Statutes of the State of California:

Section 1 of the Act of Congress of July 2, 1890; Section 2 of the Act of Congress of July 2, 1890; Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act (15 USCA §§ 1, 2); Section 4 of the Act of Congress of October 15, 1914; Section 16 of the Act of Congress of October 15, 1914, commonly known as the Clayton Anti-Trust Act (15 USCA §§ 15, 26); Section 2 [1104] of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (15 USCA §§ 13, 13 (a) 1); Sections 16,700 to 16,758 of the California Business and Professions Code, commonly known as the Cartwright Anti-Trust Law, and Sections 17,000 to 17,101, inclusive, of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facili-

ties and the conspiracies and combinations to discriminate in price, service and facilities, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court, and elsewhere in California and throughout the United States.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Company is, and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California. Plaintiff filed a Petition under Chapter 10 of the Bankruptcy Act, known as No. 53860-c in the files of this court, on March 19, 1952, and, on or about March 26, 1952, plaintiff filed a petition for reorganization under said Act, and Ronald Walker, intervener herein, was appointed trustee of the assets of plaintiff by the court, in said proceedings.

(b) Plaintiff's Business. Prior to the bankruptcy proceedings referred to in Par. II (a) herein, plaintiff was a juice canner of by-product citrus fruit, i.e., oranges, lemons and grapefruit, buying the said by-product fruit in Arizona and California, processing and canning the fruit into natural and frozen concentrate [1105] juice, in Anaheim, California, and causing the canned juices to be transported and marketed in intrastate and interstate commerce throughout the United States. In 1950 and 1951 plaintiff furthermore caused canned citrus

fruit juice to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States.

III.

Defendants.

(a) California Fruit Growers Exchange (hereinafter referred to as Sunkist) is, and at all times herein mentioned was a California membership corporation with its principal place of business in the City of Los Angeles, California. The name of said defendant was changed to Sunkist Growers, Inc., on or about February 8, 1952. The members of Sunkist produce about 70% of all the oranges grown in the State of California. Sunkist is and at all times mentioned herein was in the business of marketing fresh citrus fruit throughout the United States. Through a subsidiary company, The Exchange Orange Products Company, one of the defendants herein, Sunkist is and at all times mentioned herein was in the business of canning fruit juices and marketing the said fruit juices in intrastate and interstate commerce throughout the United States.

(b) The Exchange Orange Products Company (hereinafter referred to as E.O.P.) is, and at all times herein mentioned was, a California corporation, with its principal place of business in the County of Los Angeles, California. It is and at all times herein mentioned was engaged in the business of processing and canning by-product fruit into

natural and frozen concentrate citrus fruit juices. The fruit juices canned directly by E.O.P. are marketed for said defendant in intrastate and interstate commerce throughout the United States by defendant Sunkist.

(c) Exchange Lemon Products Company (referred to hereinafter as E.L.P.) is, and at all times herein mentioned, was a [1106] California corporation with its principal place of business in the City of Corona, California. Substantially all the lemons produced in the United States are produced in California. The members of E.L.P. produce about 90% of all lemons produced in California. E.L.P. is, and during the year 1951 was, among other things engaged in the business of producing lemons and canning natural and frozen concentrate citrus fruit juices. In December, 1950, E.L.P. acquired all the capital stock of Dameral-Allison Company, a California corporation and a processor of citrus fruit juices, and merged the assets of said company with E.L.P., thereafter selling the orange juice and frozen concentrate so acquired in competition with the plaintiff during the year 1951. Substantially all the citrus fruit juices canned by E.L.P. are marketed for it throughout the United States by defendant, Sunkist.

(d) TreeSweet Products Company (hereinafter referred to as TreeSweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California. It is and at all times mentioned was a

juice canner of by-product fruit, buying the said by-product fruit in Arizona and California, and causing the canned juices to be transported in intrastate and interstate commerce into the various states of the United States, including the states in which plaintiff marketed its canned juices. Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) E. A. Silzle Corporation (hereinafter referred to as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Said corporation is engaged in the business of processing by-product citrus fruit into natural and frozen concentrate juice and marketing the same in the State of California and other states [1107] of the United States. It is named a co-conspirator, but is not made a defendant herein.

IV.

Definitions:

"Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for processing into single strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satis-

factory for or capable of being absorbed by the fresh citrus fruit market.

"Citrus fruit juice" refers to "natural" and "frozen concentrate" juice processed from "by-product fruit."

"Natural fruit juice" refers to "single strength juice" and "hot pasteurized concentrate juice."

"Frozen concentrate juice" refers to concentrate citrus fruit juice processed under low temperature and quickly frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any co-operative or association such as Sunkist, marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry

(a) Substantially all of the citrus fruit marketed in the United States is produced in the states of California, Florida, Texas and Arizona.

(b) Defendant Sunkist is the largest citrus fruit marketing organization in the United States, and through its subsidiary, E.O.P., [1108] is the largest single source of by-product oranges in the State of California. As marketing agent for defendant, E.L.P., Sunkist also is the largest marketing organization for lemons, other than by-product lemons,

marketed as fresh fruit in interstate trade and commerce throughout the United States.

(c) Defendant E.L.P. is the primary and principal source of by-product lemons used by plaintiff and other independent juice canners in producing canned natural and frozen concentrate lemon juice.

(d) Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit for processing into canned natural or frozen concentrate juice.

(e) During the year 1951 defendant Sunkist engaged in an extensive advertising program to promote the trade name "Sunkist" as applied to canned natural and frozen concentrate fruit juices marketed by it and for defendant E.L.P., in intrastate and interstate commerce.

(f) Substantially all the canned natural and frozen concentrate citrus fruit juices sold in the United States are canned in the states of California, Florida, Texas and Arizona. Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951, approximately 50% and 80% in the respective years, of canned natural and frozen concentrate orange juice produced in California and Arizona and thereafter marketed throughout the United States, was processed by or on behalf of defendant Sunkist.

(g) Plaintiff is informed and therefore alleges upon information and belief that in the years 1950

and 1951 more than 50% of the canned natural and frozen concentrate lemon juice produced in California and Arizona and marketed throughout the United States was processed by or on behalf of defendants Sunkist and E.L.P.

(h) Defendant E.O.P.'s sole source of supply of by-product fruit in 1951 was defendants Sunkist and E.L.P. [1109]

(i) Substantially all the by-product oranges processed by defendant E.L.P. into natural and frozen orange concentrate juice are secured from defendant E.O.P.

(j) Plaintiff is informed and therefore alleges upon information and belief that defendant Tree-Sweet's principal, if not exclusive, source of supply of by-product fruit in 1951 was defendants E.O.P. and E.L.P.

VI.

Interstate Commerce

(a) The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant, continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and making of contracts, written and wired communications, the assemblage of personnel, property and material in California, Arizona and Texas, the transportation

of fresh fruit from Arizona and Texas to California, the shipping of fresh fruit from California to all the states of the United States, the processing and canning of by-product fruit in California, Arizona, Florida and Texas, and the shipping of the natural and frozen concentrate fruit juices produced therefrom, throughout the United States.

(b) Plaintiff, as part of the citrus industry during the year 1951, was engaged at its Anaheim, California, plant in the business of processing by-product fruit into natural and frozen concentrate juice and thereafter selling the same in intra and interstate commerce in competition with natural and concentrate juices processed and sold by defendants and co-conspirator Silzle. Among other things and in the course of purchasing by-product fruit from defendants E.O.P., E.L.P. and others, plaintiff caused fresh fruit produced in Arizona to be shipped to it by interstate carriers, from [1110] Arizona to California. In 1951 plaintiff also purchased some natural juice in the states of Florida and California from processors located in said states, for resale purposes to customers of plaintiff located in the various states of the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant, continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and

material in at least fifty cities of the United States: the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiary, E.O.P., and defendant E.L.P. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Defendant E.L.P. is and during the year 1951 was engaged in interstate trade and commerce throughout the United States in transporting canned fruit juices from California to other states of the United States.

(e) Defendant TreeSweet is and was during the year 1951 engaged in interstate trade and commerce throughout the United States in transporting and selling canned fruit juices from California to and in other states of the United States.

(f) Plaintiff, defendants Sunkist, E.O.P., E.L.P., TreeSweet and co-conspirator Silzle processed or caused to be processed substantially all the canned natural and frozen concentrate orange and lemon juice produced in the State of California during the year 1951. A substantial part of said canned fruit juice was transported in interstate commerce.

VII.

Damages

Prior to 1951 plaintiff enjoyed an extensive and profitable [1111] business and had expended in

excess of $500,000.00 in promoting and developing good will, reputation and distribution for its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff was eliminated as a competitive factor in the business of processing and selling citrus fruit juices in intrastate and interstate markets, and has been injured in its business and property, good will, promotions, advertising, and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff.

VIII.

Threatened Loss and Damage

By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first-class juice canner has been seriously and irreparably impaired and injured, and to the unfair, wrongful and competitive advantage of defendants and others;

(b) Plaintiff was compelled to pay unreasonable and discriminatory prices for by-product fruit to the damage and loss of plaintiff and to the unfair, wrongful and competitive advantage of the defendants and others;

(c) Plaintiff has irreparably lost patronage for its products and otherwise continues to be threatened with loss and damage;

(d) Plaintiff is without any plain, speedy or adequate remedy at law, and unless the defendants and each of them are temporarily and permanently restrained and enjoined, pursuant to pertinent statutes and laws, from continuing their unlawful practices and activities as herein alleged, defendants will continue their wrongful acts and conduct and plaintiff will continue to suffer [1112] irreparable loss and damage.

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section I of the Sherman Act

All of the defendants, each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, have, for many years last past, in the course of interstate trade and commerce, combined and conspired with each other and have entered into contracts which have had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in the State of California and mar-

keted throughout the United States with resultant injury and damage to the plaintiff.

III.

Specifications

For some time past, and particularly since in or about the year 1951, the exact date being unknown to plaintiff, the defendants and co-conspirator Silzle combined and conspired and entered into contracts which have had the effect of tending to eliminate plaintiff and of eliminating plaintiff as a competitor in the canned natural and frozen concentrate juice market of the United States and particularly from the single strength orange juice market therein, so as to disable and prevent plaintiff from competing with the defendants in such market.

The defendants and co-conspirator Silzle have done the things they conspired and combined to do and among other things have entered into contracts, written and oral, which have had the [1113] force and effect of eliminating the competition of the plaintiff in such market. Specifically, among other things, said defendants did the following acts:

(a) Defendant E.L.P., by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural and frozen citrus fruit juice, at cost and without profit to E.L.P. During the canning season, 1950-1951, defendant

E.L.P. processed 28,812 tons of oranges for E.O.P. under said oral agreement.

(b) Defendant E.O.P., by oral agreement, agreed to process and did process in 1951 lemons made available to E.O.P. by E.L.P. for processing into canned, natural and frozen citrus fruit juice at cost and without profit to E.O.P., or defendant Sunkist. E.O.P. processed 1,740 tons of lemons for E.L.P. during the 1950-1951 season under said oral agreement.

(c) Defendants Sunkist and E.O.P. agreed to establish and maintain the price of by-product oranges available to independent processors of natural and frozen concentrate juice, such a plaintiff, at a price which would make it impossible for independent processors such as plaintiff to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price, or under any other arrangement that would enable plaintiff and other independent processors to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and co-conspirator Silzle.

(d) Defendant E.O.P. and defendant TreeSweet entered into a written custom packing agreement with an effective date of July 23, 1951, which provided among other things for the processing of by-product oranges into natural orange juice for the account of E.O.P. at cost and without profit to

defendant TreeSweet. Said contract [1114] also provided for the purchase by defendant TreeSweet from Sunkist of the "canned juice requirements" of TreeSweet. The contract had the purpose and effect of enabling defendant TreeSweet to process by-product oranges into natural orange juice without purchasing by-product oranges from E.O.P. or any other supplier, and to secure its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with defendants Sunkist or TreeSweet in the natural orange juice market. Defendant E.O.P. furnished by-product oranges to TreeSweet during the 1951 orange juice canning season, under said contract, which oranges TreeSweet processed at cost for defendant E.O.P., defendant Sunkist selling and defendant TreeSweet acquiring its requirements of natural orange juice from E.O.P., thereunder, during the latter part of 1951 and the early part of 1952. Substantially all the single natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market.

(e) Defendant E.O.P. and co-conspirator Silzle entered into a written contract executed September 10, 1951, but effective as of June 26, 1951, wherein, among other things, defendant E.O.P. agreed to make by-product oranges available to Silzle for processing into canned orange juice under the Silzle label at a cost of $22.50 a ton or substantially below

the price at which defendant E.O.P. was then selling or willing to sell by-product oranges of the same quality for processing purposes to plaintiff and other independent processors. Defendant E.O.P. furnished by-product oranges to Silzle and Silzle acquired by-product oranges from defendant E.O.P. during the 1951 canning season under said contract and produced 85,080 cases of canned natural orange juice thereunder, which juice was processed, acquired and sold by Silzle in competition with juice processed and sold by plaintiff in the canned natural orange juice market. Said contract had the purpose and effect of enabling Silzle [1115] to acquire by-product oranges at a price substantially below the price then charged other independent processors, such as plaintiff by E.O.P. for by-product oranges and enabled Silzle to acquire its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with Silzle and defendants Sunkist, E.O.P., E.L.P. and TreeSweet in the natural orange juice market.

(f) Defendant E.O.P. refused to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant TreeSweet and co-conspirator Silzle.

As a direct and approximate result of each of the above acts of the defendants, plaintiff was unable to process, can and sell natural and frozen concentrate fruit juice in competition with defendants or co-conspirator Silzle and was forced to file proceed-

ings under Chapter 10 of the Bankruptcy Act of March 19, 1952, and has been damaged in the manner and to the extent alleged in Paragraphs VII and VIII herein.

Second Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section 2 of the Sherman Act

Defendants Sunkist, E.O.P. and E.L.P. have a monopoly control over the production and distribution of fresh citrus fruit available in California and Arizona for processing into canned natural and frozen concentrate citrus fruit juice in the State of California. By entering into the oral and written agreements and in doing the acts described in Paragraph III (a) to (f), inclusive, herein, defendants Sunkist, E.O.P. and E.L.P. have attempted to monopolize, and in fact have monopolized that part of the [1116] interstate trade and commerce in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California and thereafter transported and sold in intra and interstate commerce, with the resultant damages and injury to the plaintiff as alleged in Paragraphs VII and VIII herein.

Pursuant to a conspiracy to monopolize and said attempt to monopolize the aforesaid part of the trade and commerce of the United States in canned natural and frozen concentrate citrus fruit juice, defendants Sunkist and E.L.P entered into the oral agreements and contracts and did the acts referred to in Paragraph III (a) to (f), inclusive, herein, and delivered and sold by-product oranges, in the course of such commerce, to the parties to said contracts, which were thereafter processed into natural orange juice which was purchased by defendant TreeSweet and co-conspirator Silzle from E.O.P., for resale purposes at prices which prevented plaintiff from processing and selling natural orange juice at prices competitive to those at which defendants Sunkist, E.L.P., TreeSweet and co-conspirator Silzle sold natural orange juice in the intrastate and interstate market for such juice, with the resultant injury and damage to the plaintiff as alleged in Paragraphs VII and VIII, herein.

Third Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the foregoing allegations.

II.

Section 1 of the Robinson-Patman Act

For many years last past and particularly in 1951, (a) defendants were and they now are en-

gaged in trade and commerce throughout the United States. (b) In the course of such commerce defendant Sunkist has through its wholly-owned subsidiary, defendant E.O.P., [1117] directly and indirectly, discriminated in price between different purchasers of commodities of like grade and quality, to wit, by-product fruit and particularly oranges for the canning of single strength orange and orange blended juice. (c) The purchases involved in such discrimination were in commerce among the several states, the District of Columbia, and the territories of the United States. (d) The effect of such discrimination was substantially to lessen competition from the plaintiff and tended to create a monopoly in the defendants and to injure, destroy and prevent competition from the plaintiff. (e) Defendants Sunkist, E.O.P., and/or E.L.P., paid and contracted for the payment of things of value to and for the benefit of its customers, including defendant Tree-Sweet and co-conspirator Silzle, in the course of such commerce, as compensation or in consideration for services and facilities furnished by and through said customers, including defendant TreeSweet and co-conspirator Silzle, in connection with the processing, handling and sale of products and commodities, to wit, canned fruit juices, particularly single strength orange and orange blended juice manufactured, sold or offered for sale by defendants Sunkist, E.O.P., and/or E.L.P., without defendants Sunkist, E.O.P. and E.L.P. making such payment or consideration available on proportionately equal terms to all other customers, including plaintiff,

competing in the distribution of such products and commodities. (f) Defendant TreeSweet in the course of such commerce knowingly induced and received discrimination in price above described and which is prohibited by law.

III.

Section 3 of the Robinson-Patman Act

For many years last past and particularly in 1951, and in the course of said commerce as hereinabove alleged, defendants and co-conspirator Silzle were parties to and assisted in transactions of sale and contracts to sell which discriminated, to their knowledge, against competitors, including plaintiff, of defendants [1118] Sunkist, E.O.P. and E.L.P.'s purchasers, including defendant TreeSweet and co-conspirator Silzle, in that allowances were granted to such purchasers, including defendant TreeSweet and co-conspirator Silzle, over and above any allowance available at the time of the transactions to said competitors, including plaintiff, in respect of sales of goods of like grade, quality and quantity, that is, by-product fruit, particularly oranges.

IV.

Specifications

(a) On April 4, 1951, defendant Sunkist published and distributed its Valencia Price Schedule # 1-51, effective April 9, 1951, which showed the price per ton, f.o.b. packing house, of Valencia oranges on the basis of pounds of soluble solids per ton. (b) The number of pounds of soluble solids

per ton varies with each run of oranges. (c) For example, where the number of pounds of soluble solids per ton was 120, the price per ton, f.o.b. packing house, pursuant to said Valencia Price Schedule, was fixed by the defendant Sunkist at $40.00. (d) In 1951 plaintiff purchased from the defendant Sunkist Valencia oranges in accordance with the sale price schedule. (e) In 1951 defendant TreeSweet and co-conspirator Silzle directly and indirectly by means of the contracts referred to in Paragraph III, (a) to (f), inclusive herein, purchased Valencia oranges of like grade and quality as did plaintiff, from the other defendants, for a price less than one-half that fixed by the said schedule of prices and paid by plaintiff.

V.

Further Specification

Plaintiff is informed and therefore alleges upon information and belief that one of the methods used by the defendants in effectuating the price discrimination in favor of the defendant TreeSweet and co-conspirator Silzle (as well as others) and discrimination against plaintiff was substantially as follows: [1119]

Defendants Sunkist and E.O.P. delivered by-product oranges to defendant TreeSweet (and others) on consignment under an arrangement whereby these canners produced single strength orange juice for defendant E.O.P., and for which defendant E.O.P. paid the cost incurred to produce such juice. Defendant TreeSweet and co-conspira-

tor Silzle were then permitted to purchase the canned orange juice from defendant E.O.P. at approximately $2.30 a case. Thus, after producing and canning the orange juice, defendant TreeSweet acquired packed orange juice at a net cost which in substance reflected a cost of the by-product oranges used in such product of less than one-half the price set forth in defendant Sunkist's said Valencia Price Schedule.

VI.

Further Specifications

During the period mentioned in the previous paragraph plaintiff requested of the defendants Sunkist and E.O.P. that it be permitted to make similar transactions as above described, with the said defendants, which request was denied. Plaintiff also purchased a carload of canned natural orange juice from defendant E.O.P. on or about September 28, 1951, for resale purposes, which carload was sold in competition with the natural orange juice sold by defendants Sunkist, E.L.P., TreeSweet and co-conspirator Silzle, which price was discriminatory as to plaintiff and in violation of Section 2 (15 U.S.C. 13a) of the Clayton Act.

Fourth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the foregoing allegations above.

II.

Cartwright Anti-Trust Act

(a) For some time past in the State of California defendants [1120] combined their capital and skill and together acted to create and carry out restrictions in trade and commerce and to prevent competition in the manufacture, making, transportation, sale and purchase of canned natural and frozen concentrate citrus juice, particularly canned natural orange juice, and defendants did (1) create and carry out restrictions in trade and commerce; (2) prevent competition in the manufacture, making, transportation, sale and purchase of said canned natural and frozen concentrate citrus juice; (3) make, enter into, execute and carry out contracts, obligations and agreements by which they established and settled the price of said product and commodities so as to directly and indirectly to preclude a free and unrestricted competition among themselves and any purchasers in the sale of such produce and commodities, and they did combine and directly and indirectly united their interests which they had in connection with the sale of such produce and commodities so that the price of the said produce and commodities was affected.

(b) All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the business of canned natural and frozen concentrate citrus juice, particularly canned natural orange juice, within the State of California.

III.

Specifications.

For some time past, particularly since in or about the year 1951, the defendants contracted, combined, conspired, monopolized and attempted to monopolize in such manner as to eliminate plaintiff from the canned citrus fruit industry, particularly from the canned citrus fruit industry, particularly from the single strength orange market, and so as to disable plaintiff from competing with the defendants freely, fairly and reasonably within the State of California by doing in intrastate commerce, among other things, the acts described in Paragraph III of the First Cause of Action, [1121] Paragraph II of the Second Cause of Action and Paragraphs II, III, IV, V, and VI of the Third Cause of Action, as having been alone in interstate commerce.

Fifth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every allegation of the foregoing allegations above and particularly Paragraphs II and III of the Fourth Cause of Action.

II.

Unfair Practice Act

For some time past, particularly in 1951, and in the State of California, defendants Sunkist, E.O.P., and E.L.P. secretly paid and allowed defendant

Treesweet rebates, refunds, commissions and unearned discounts, and secretly extended to defendant Treesweet special services and privileges not extended to all purchasers, including the plaintiff, purchasing upon like terms and conditions, to the injury of plaintiff, which payments and allowances tended to destroy competition.

Wherefore, plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this Complaint.

2. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants, Sunkist, E.O.P., and E.L.P., and each of them, to offer and sell by-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors, including defendants, The Exchange Orange Products Company, Exchange Lemon Products Company, Treesweet Products Company and co-conspirator Silzle, and to offer custom packing agreements to plaintiff when defendants [1122] E.O.P., Sunkist and E.L.P. offer comparable agreements to defendants Treesweet and co-conspirator Silzle.

3. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the

monopolization of the same hereinabove described, be declared illegal and violative of the anti-trust laws of the United States and the State of California.

4. That plaintiff have judgment in the sum of $2,400,000.00, the same being threefold damages under the Federal laws which it sustained for the violations alleged in the First and Second Causes of Action, or $1,600,000.00, the same being twofold damages under state law, for the violations alleged in the Fourth and Fifth Causes of Action and such further and additional damages as may have been suffered by plaintiff for the violations of law alleged in said Third Cause of Action.

5. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

6. For all other proper relief.

Dated: .....

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff
and Intervening Trustee.

/s/ BERNARD REICH,
Attorney for Plaintiff.

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Affidavit of service by mail attached.

[Endorsed]: Filed December 14, 1954. [1123]

In the United States District Court, Southern District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

STIPULATION FOR DISMISSAL AND ORDER THEREON

Subject to the approval of the Court, It Is Stipulated as follows:

1. The above action is dismissed as to defendant TreeSweet Products Co., a corporation, only, and without prejudice.

2. This dismissal is made without prejudice to the prosecution of the action against the defendants other than TreeSweet Products Co., and with respect to defendants other than defendant TreeSweet Products Co., without prejudice to the plaintiff and intervener in the use of discovery already had therein. [1127]

Dated: December 7, 1954.

O'MELVENY & MYERS,

By /s/ BENNETT W. PRIEST,
Attorneys for Defendant TreeSweet Products Co., a Corporation;

/s/ HARRY M. IRWIN,
Attorney for Intervener.

/s/ RONALD WALKER,
Trustee of Winckler & Smith Citrus Products Co.

/s/ BERNARD REICH,
Attorney for Plaintiff.

It Is So Ordered: This 3rd day of January, 1955.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed January 3, 1955.

Docketed and entered January 6, 1955. [1128]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF MOTION AND MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT, AND (2) FOR A MORE DEFINITE STATEMENT

* * *

1. To strike the following portions of plaintiff's amended complaint, with leave to amend, upon the ground that they fail to comply with Rules 8(a)(1), 8(a)(2) and 8(e)(1) of the Federal Rules of Civil Procedure, which require that a complaint shall contain a "plain statement" of the grounds of the Court's [1129] jurisdiction and of "the claim showing that the pleader is entitled to relief," and that "each averment of a pleading shall be simple, concise and direct":

a. Paragraphs II and III of the so-called "First Cause of Action."

b. Paragraphs I and II of the so-called "Second Cause of Action."

* * *

2. In the alternative, to order plaintiff to file a more definite statement with respect to the said paragraphs of the amended complaint, as hereinafter specified.

3. To strike all claims stated in the amended complaint that were not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint, on the ground they are barred by the applicable statute of limitations.

* * *

For grounds and specifications of said motion, defendant will state:

Motion to Strike (Rule 8)

First So-called "Cause of Action,"

Paragraphs II and III

1. There is no identification of the supposed tortious act, or acts, of defendants, whether committed pursuant to [1130] an alleged conspiracy and combination or pursuant to an alleged illegal contract, that are claimed to have injured the plaintiff;

2. The complaint fails to disclose how many conspiracies and combinations are claimed or to identify their parties and substantial terms;

3. No "specifications" whatsoever are set forth with respect to grapefruit or grapefruit juices, and no substantial specifications are set forth with respect to lemons, although it is claimed the offenses related to "citrus juices," which include grapefruit juice and lemon juice by definition (paragraph IV of the general allegations);

4. There is no showing that any right, or rights, of plaintiff have been violated by the defendants pursuant to any unlawful contract, combination, or conspiracy;

5. There is no showing of a causal connection between plaintiff's claimed injury and anything claimed to have been done by one or more defendants;

6. There is no showing of any injury to the public; and

7. There is no showing that the supposed unlawful contracts, combinations and conspiracies had any substantial effect upon interstate commerce.

Second So-called "Cause of Action,"

Paragraphs I and II

1. This so-called "cause of action" does not state a claim upon which relief can be granted separate and distinct from the so-called "first cause of action";

2. The supposed tortious act, or acts, committed pursuant to the claimed attempt or attempts to monopolize, claimed monopoly or claimed conspiracy to monopolize, and [1131] which are supposed to have injured the plaintiff, are not stated;

3. The right, or rights, of the plaintiff claimed to have been violated by the defendants pursuant to the offenses sought to be alleged are not identified;

4. There is no allegation showing a causal connection between plaintiff's claimed injury and anything supposed to have been done by the defendants;

5. No substantial terms of the claimed "conspiracy to monopolize" are stated;

6. No public injury is shown;

7. Paragraph II confusingly treats an alleged joint attempt to monopolize, a joint monopolizing, and a conspiracy to monopolize as if they were separate offenses under the Sherman Act instead of the same offense, which the statute designates a "conspiracy to monopolize"; and

8. Paragraph II fails to show that the "natural and frozen concentrate fruit juices processed in California" (lines 2 and 3, page 14) are competitively unique and distinct from similiar juices processed in Florida, Texas and Arizona (paragraph V (f) of the general allegations alleges processing in these states), so that such California juices constitute an identifiable market in interstate commerce that might be the subject of an unlawful monopoly, attempt to monopolize, or conspiracy to monopolize. [1132]

* * *

Motion for More Definite Statement

The grounds of the alternative motion for a more definite statement are that the said paragraphs are too vague and ambiguous in the respects set forth above with respect to defendant's motion to strike

to enable this defendant to frame a responsive answer.

Motion to Strike (Statute of Limitations)

The following paragraphs plead supposed acts of defendants not pleaded in the original complaint, and that were committed, if at all, more than three years before the filing of the amended complaint:

Subparagraph (e) of paragraph II, and para- III of the first so-called "cause of action."

Subparagraph (e) of paragraph II, and paragraphs III, V and VI, of the so-called third "cause of action." [1135]

* * *

Dated January 26, 1955.

Respectfully submitted,

CLAYSON, STARK & ROTHROCK,
POPE & BALLARD,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1955. [1136]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF MOTION OF DEFENDANTS SUNKIST GROWERS, INC. (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, IN THE ALTERNATIVE: (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT, AND (2) FOR A MORE DEFINITE STATEMENT

To: Winckler & Smith Citrus Products Co., a corporation, the above-named plaintiff, and to Bernard Reich, Esq., its attorney; and

To: Ronald Walker, Esq., trustee and intervener, and to Harry M. Irwin, Esq., attorney for said trustee; and [1162]

To: William C. Dixon, Esq., attorney for plaintiff and said intervening trustee.

Please Take Notice that the undersigned will bring the attached motion by defendants Sunkist Growers, Inc. (sued herein as California Fruit Growers Exchange), and The Exchange Orange Products Company, in the alternative: (1) to strike portions of the amended complaint, and (2) for a more definite statement, and the memorandum of points and authorities in support thereof attached thereto, on for hearing before this court in the courtroom of the Honorable James M. Carter, District

Judge, United States Post Office and Court House Building, located at Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, on the 14th day of February, 1955, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 28th day of January, 1955.

FARRAND, FISHER & FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,

Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of copy acknowledged. [1163]

[Title of District Court and Cause.]

No. 13788-C

MOTION BY DEFENDANTS SUNKIST GROWERS, INC. (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, IN THE ALTERNATIVE: (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT; AND (2) FOR A MORE DEFINITE STATEMENT

Defendants Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange and hereinafter

in this motion referred to as "Sunkist," and The Exchange Orange Products Company, hereinafter in [1164] this motion referred to as "EOP," move the court as follows:

I.

To strike the following portions of plaintiff's amended complaint, with leave to amend, upon the ground that they fail to comply with Rules 8 (a) (1), and 8 (a) (2) of the Federal Rules of Civil Procedure which require that a complaint shall contain a "plain statement" of the grounds of the court's jurisdiction and of "the claim showing that the pleader is entitled to relief," and that "each averment of a pleading shall be simple, concise and direct":

(a) Paragraphs II and III of the alleged "First Cause of Action";

(b) Paragraphs I and II of the alleged "Second Cause of Action";

(c) Subparagraphs (b), (c), (d) and (e) of paragraph II; paragraph III; paragraph IV and paragraph VI of the alleged "Third Cause of Action";

(d) Paragraphs II and III of the alleged "Fourth Cause of Action";

(e) Paragraph II of the alleged "Fifth Cause of Action."

II.

In the alternative, to order plaintiff to file a more definite statement with respect to the said paragraphs of the amended complaint.

III.

To strike, without leave to amend, all claims stated in the amended complaint that were not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint on the grounds that they are barred by the applicable statute of limitations, being Section 338 (1) of the Code of Civil Procedure of the State of California. [1165]

IV.

To strike paragraph VII of the General Allegations of the amended complaint, with leave to amend, for failure to state specifically items of special damage as required by Rule 9 (g) of the Federal Rules of Civil Procedure.

For grounds and specifications of said motion these moving defendants represent and state:

1. In order to avoid repetition these moving defendants adopt by this reference and incorporate herein as though herein set forth in full the notice of motion and motion of defendant Exchange Lemon Products Company (1) to strike portions of the amended complaint, and (2) for a more definite statement, dated January 26, 1955, heretofore filed herein insofar as said motion of said defendant Exchange Lemon Products Company is applicable to these moving defendants. These moving defendants will therefore include herein only matters supple-

mental to or in addition to the matters covered by Exchange Lemon Products Company's said motion.

2. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike subparagraphs (b), (c) and (d) of paragraph II of plaintiff's alleged third cause of action for the following reasons:

(a) There is no identification of the purchases alleged to have been made. The specifications relate only to Valencia oranges or Valencia orange juice although these subparagraphs allegedly relate to by-product fruit which by plaintiff's definition (plaintiff's amended complaint General Allegations, paragraph IV, p. 5), would refer to oranges, lemons and grapefruit.

(b) There is no showing of any effect of the alleged discrimination upon competition nor of the volume of the alleged discriminatory sales, nor as to the products with respect to which competition was allegedly substantially lessened or prevented.

(c) There is no showing of any effect of the alleged discrimination upon monopoly or as to the products allegedly tending to be monopolized.

3. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike paragraph IV of plaintiff's alleged third cause of action for the following reasons:

(a) There is no showing in subparagraph (d) of said paragraph IV of plaintiff's third cause of ac-

tion as to the date or dates in 1951 that plaintiff purchased Valencia oranges from Sunkist, nor as to the amount purchased nor as to the use to which the plaintiff put said oranges. It cannot be determined from said subparagraph (d) whether said alleged purchases of Valencia oranges were made before or after the contracts referred to in paragraph III (a) to (f) of plaintiff's alleged third cause of action were entered into or whether the oranges were used to make products competitive to the products alleged to have been made under the contract.

4. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike the following portions of paragraph VI of plaintiff's alleged third cause of action for the following reasons:

(a) The first sentence of paragraph VI should be stricken as the allegation is immaterial to an alleged violation of the Robinson-Patman Act.

(b) The second sentence of paragraph VI should be stricken as there is no showing that the alleged sale of a carload of canned natural orange juice to plaintiff arose in the course of interstate commerce.

This motion will be based upon the records and files in [1167] this case and upon the memorandum of points and authorities in support of this motion hereto attached.

Dated: January 28th, 1955.

Respectfully submitted,

FARRAND, FISHER &
FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company. [1168]

Memorandum of Points and Authorities in Support of Motion of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company, in the Alternative: (1) To Strike Portions of the Amended Complaint; and (2) for a More Definite Statement

1. Adoption by reference of defendant Exchange Lemon Products Company's Memorandum of Points and Authorities.

In order to avoid repetition these moving defendants adopt by this reference and incorporate herein as though herein set forth in full the Memorandum of Points and Authorities of defendant Exchange Lemon Products Company in support of its motion in the alternative (1) to strike portions of the amended complaint; and (2) for a more definite statement, heretofore filed herein and accompanying its said motion insofar as said Memorandum of Points and Authorities is applicable to the motion

made by these moving defendants. These moving defendants will therefore include herein only points and authorities supplemental to or in addition to matters covered by Exchange Lemon Products Company's Memorandum of Points and Authorities.

2. Motion to strike subparagraphs (b), (c) and (d) of paragraph II of plaintiff's alleged third cause of action.

Defendant's reasons for the motion are adequately stated in the motion and hence will not be amplified in this memorandum. There is no statement in plaintiff's amended complaint showing the effect of the alleged discrimination upon competition. The amended complaint should allege the amount of purchases alleged to have been made, the type of product and its effect both upon competition and upon monopoly. Title 15 U.S.C.A. Sec. 13 requires that the effect of [1169] the alleged discrimination must be "substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers or either of them." None of these matters are alleged in plaintiff's amended complaint and without such showing adequate answer cannot be framed to the amended complaint.

3. Motion to strike paragraph IV of plaintiff's third cause of action.

As pointed out in these moving defendants' motion, there is no showing in subparagraph (d) of paragraph IV of plaintiff's third cause of action as to the date or dates in 1951 that plaintiff purchased Valencia oranges from Sunkist, nor as to the amount purchased, nor as to the use to which plaintiff put said oranges, nor can it be determined from said subparagraph whether the alleged purchases of Valencia oranges were made before or after the TreeSweet and Silzle contracts alleged in plaintiff's amended complaint were entered into.

In a charge of violation of the Robinson-Patman Act it is essential that the plaintiff show that it is a "purchaser" at the time the alleged discrimination took place. The fact that plaintiff may have been a purchaser in the past is not enough.

See Shaw's, Inc., v. Wilson-Jones Co., 105 Fed. (2d) 331 (C.C.A. 3d, 1939), (a Robinson-Patman Act case), wherein the court said, at page 333:

> "Past purchases or conversations with respect to possible future purchases are insufficient."

Also, Sorrentino v. Glen-Gery Shale Brick Corporation, 46 Fed. Supp. 709 (Dist. Ct. E.D. Penn. 1942), wherein in sustaining defendant's motion to dismiss plaintiff's complaint under the [1170] Robinson-Patman Act the Court said, at page 711:

> "Plaintiff's arguments that his past purchases from Glen-Gery make him a 'purchaser'

within the meaning of this section and that defendant manufacturers' refusal to sell him while selling to Margolis constitutes a 'discrimination' between 'purchasers' in violation thereof cannot be sustained."

(The Court then quoted extensively from the Shaw's, Inc., v. Wilson-Jones Co. case, supra.)

Also, Chicago Seating Co. v. S. Karpen & Bros., 83 Fed. Supp. 409 (U.S. Dist. Ct. N.D. Ill., E.D. 1949).

4. Motion to Strike Paragraph VI of plaintiff's third cause of action.

(a) The allegation contained in the first sentence of paragraph VI that plaintiff requested of these moving defendants that plaintiff be permitted to make "similar transactions as above described, with the said defendants, which request was denied," is immaterial to a Robinson-Patman Act charge and should be stricken.

It is fundamental that the gravamen of such a charge is a discrimination among "purchasers" and that a seller has a right to select his customers. A refusal to sell is immaterial to a Robinson-Patman Act charge.

See cases cited under 3 above.

Also, Z. T. Naifeh, d.b.a. Sooner Sales Company v. Ronson Art Metal Works, Inc., C C H Trade Reg-

ulation Service, ¶ 67,646 (U.S. Dist. Ct. W.D. Okla. 1953).

(b) There is no showing in the second sentence of paragraph VI that the alleged sale of natural orange juice to plaintiff occurred in the "course" of interstate commerce. It is of course essential to a claimed violation of the Robinson-Patman Act that the alleged discrimination be in the course of interstate commerce. [1171] Unless plaintiff alleges facts from which it can be determined that the purchase occurred in the course of commerce no claim is stated. Plaintiff should allege where the alleged sale to it of the carload of orange juice took place. Otherwise it cannot be determined whether the sale occurred in the course of commerce.

5. Motion to Strike (Statute of Limitations).

All claims stated in the amended complaint not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint should be stricken without leave to amend on the grounds that they are barred by the statute of limitations. As stated in defendant Exchange Lemon Products Company's memorandum of points and authorities, subparagraphs (a) through (f) of paragraph III of plaintiff's first cause of action, subparagraph (e) of paragraph II and paragraphs III, IV, V and VI of plaintiff's third cause of action plead supposed acts of these answering defendants not alleged in the original complaint and that were committed, if at all, more than three years before the filing of the amended

complaint. For example, the alleged sale of a carload of juice to plaintiff on September 28, 1951, referred to in paragraph VI of plaintiff's amended complaint, not pleaded in plaintiff's original complaint, occurred more than three years prior to the filing of plaintiff's amended complaint. Any recovery of damages by plaintiff for injuries caused by such supposed acts is therefore barred by the statute of limitations.

The antitrust laws contain no definite statute of limitations. It was early held that there should be applied to such actions the statute of limitations of the state where the alleged violations of the antitrust laws took place. As the alleged violations in this case took place in California the California statute of limitations would be applicable, being section 338 (1) of the Code of Civil Procedure of the State of California. [1172]

See

Burnham Chemical Co. v. Borax Consolidated, Ltd.
170 Fed. (2d) 569, at p. 575 (C.C.A. 9th, 1948);

Suckow Borax Mines Consolidated, Inc., v. Borax Consolidated, Ltd.
185 Fed. (2d) 196 at p. 204 (C.C.A. 9th, 1950);

Levy v. Paramount Pictures, Inc.
104 Fed. Supp. 787 (U.S. Dist. Ct. N.D. of Calif. S.D. 1952).

Respectfully submitted,

FARRAND, FISHER & FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed January 28, 1955. [1173]

[Title of District Court and Cause.]

No. 13788-C

MINUTES OF THE COURT
FEB. 14, 1955

Present: Hon. James M. Carter, District Judge:

Counsel for Plaintiff: Bernard Reich;

Counsel for Intervening Plaintiff, Ronald Walker, as Trustee, etc.: William C. Dixon and Harry M. Irwin;

Counsel for Defendants Sunkist & Exchange Orange: Ross C. Fisher;

Counsel for Defendant Exchange Lemon: Melville Williams; Donald Stark.

Proceedings:

For (A) hearing motion of defendants Sunkist Growers, Inc., and Exchange Orange Products, filed

January 28, 1955, (1) to strike portions of the amended complaint, and (2) in the alternative, for a more definite statement;

(B) hearing motion of defendant Exchange Lemon Products Co., filed January 27, 1955, (1) to strike portions of the amended complaint, and (2) in the alternative, for a more definite statement.

Attorney Williams argues in support of motions.

Attorney Dixon argues in opposition.

Attorney Fisher argues in support of motions.

It Is Ordered that each of said motion is denied.

EDMUND L. SMITH,
Clerk;

By /s/ L. B. FIGG,
Deputy Clerk. [1201]

[Title of District Court and Cause.]

Case No. 13788—C

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO PLAINTIFF'S AND TRUSTEE AND INTERVENER'S AMENDED COMPLAINT

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and

defendant The Exchange Orange Products Company, a corporation, and, for answer to plaintiff's and trustee and intervener's amended complaint, admit, deny and allege as follows:

(For the convenience of the Court, the subheadings used in this answer correspond to those used in the amended complaint.) [1212]

Answer to General Allegations of Amended Complaint

I.

Jurisdiction. Admit that plaintiff's amended complaint purports to be filed and the proceedings purport to be instituted under the acts of Congress and Statutes of the State of California set forth in paragraph I of plaintiff's General Allegations.

Deny the allegations of the last subparagraph of paragraph I of plaintiff's General Allegations, and particularly deny that defendants here answering or either of them at any time alleged in plaintiff's amended complaint, or at all, committed any unlawful act or violation as described in plaintiff's amended complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities.

or any conspiracy or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's amended complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States or at all.

II.

(a) Plaintiff. Admit the allegations of subparagraph (a) of paragraph II of plaintiff's General Allegations.

(b) Plaintiff's Business. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of paragraph II of plaintiff's General Allegations, except, that defendants admit that prior to the bankruptcy proceedings referred to in subparagraph (b) of paragraph II of plaintiff's General Allegations, [1213] plaintiff was a juice canner of citrus fruit, processing and canning the fruit into natural and frozen concentrate juice in Anaheim, California, and that plaintiff bought citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951 plaintiff caused citrus fruit juice to be custom packed for it in the State of Florida.

III.

(a) Defendants. For answer to subparagraph (a) of paragraph III of plaintiff's General Allega-

tions, admit that defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's amended complaint was a California membership corporation, with its principal place of business in the City of Los Angeles, California, and admit that its name was changed to Sunkist Growers, Inc., on or about February 8, 1952, and admit that its member-growers produce about 70% of the oranges grown in the State of California, and allege in that regard that at all of said times said defendant was and is a corporation duly existing under and by virtue of the laws of the State of California, to wit, a nonprofit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of nonmembers to an amount greater in value than such as are handled by it for its members. Admit that it is now and at all times mentioned in plaintiff's amended complaint was in the business of marketing fresh citrus fruit of its members throughout the United States and elsewhere. Admit that a subsidiary company of Sunkist, [1214] The Exchange Orange Products Company, one of the defendants here answering, is and at all times mentioned in plaintiff's amended com-

plaint was in the business of canning orange and grapefruit juices, but allege that such juices so canned by defendant The Exchange Orange Products Company were and are marketed by it through Sunkist. Admit that said juices so canned were and are marketed in intrastate and interstate commerce throughout the United States.

(b) For answer to subparagraph (b) of paragraph III of plaintiff's General Allegations, admit that defendant The Exchange Orange Products Company (being referred to in plaintiff's amended complaint and sometimes herein as EOP) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the County of Los Angeles, State of California. Admit that said defendant is and at all times mentioned in plaintiff's amended complaint was engaged in the business of processing and canning oranges and grapefruit into, among other products, natural and frozen concentrate fruit juices. Admit that the said fruit juices canned by defendant EOP are marketed by it through Sunkist, and allege in that regard that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in products of nonmembers of Sunkist in amounts greater in value than such as are handled by it for the members of Sunkist. Admit that the said fruit juices canned by EOP

and marketed by it through Sunkist are marketed in interstate and intrastate commerce throughout the United States. Deny each, every and all of the allegations of said subparagraph (b) of paragraph III of plaintiff's General Allegations except those specifically herein admitted.

(c) For answer to subparagraph (c) of paragraph III of [1215] plaintiff's General Allegations, defendants here answering admit that Exchange Lemon Products Company (being referred to in plaintiff's amended complaint and sometimes herein as ELP) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the City of Corona, California. Admit that ELP is and during the year 1951, was among other things engaged in the business of producing natural and frozen concentrate lemon juice. Deny that it is and was during said times engaged in the business of producing lemons, and deny that it is and was during said time engaged in the business of canning natural or frozen orange juice or grapefruit juice. Admit that on or about December, 1950, ELP acquired all of the capital stock of Damerel-Allison Company, a California corporation, which was at the time a processor of citrus fruit juices, and that it merged the assets of said company with ELP. Admit that substantially all of the lemon juices canned by ELP are marketed by it throughout the United States through defendant Sunkist. Allege that ELP at all times mentioned in plaintiff's amended complaint

has been and now is a corporation organized under the laws of the State of California, and operated in compliance with the requirements of Section 1190 et seq. of the California Agricultural Code. Allege that is was organized by growers of lemons, for collectively processing, preparing for market, handling and marketing in interstate and foreign commerce lemons and lemon products, and that it is and at all times mentioned in plaintiff's amended complaint was operated for the mutual benefit of its members as producers of lemons, and that it does not pay dividends and does not deal in the products of non-members in amounts greater in value than such as are handled by it for its members. Deny for lack of information or belief each, every and all of the allegations of said subparagraph (c) of paragraph III of plaintiff's General Allegations except those specifically herein admitted. [1216]

(d) For answer to subparagraph (d) of paragraph III of plaintiff's General Allegations, admit that TreeSweet Products Co. (being referred to in plaintiff's amended complaint as TreeSweet Products Company, and being referred to in plaintiff's amended complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was among other things a juice canner of citrus fruit; admit that at times during the times mentioned in plaintiff's amended complaint it bought in California a

portion of said citrus fruit canned by it. Admit that it did and does cause a portion of the canned juices to be transported in intrastate and interstate commerce. Admit that said defendant operates and for some time has operated a plant in the State of Florida, and does and has transported and marketed some canned citrus juices from that State in interstate commerce. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of subparagraph (d) other than the allegations specifically admitted above. Allege that subsequent to the service and filing of plaintiff's amended complaint TreeSweet was dismissed as a party defendant in this action.

(e) For answer to subparagraph (e) of paragraph III of plaintiff's General Allegations, admit that E. A. Silzle Corporation (being referred to in plaintiff's amended complaint and in this answer as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Admit that said corporation is engaged in the business of processing citrus fruit into juice and marketing the same. Deny that Silzle is or was at any time mentioned in plaintiff's amended complaint or at any other time or times, a co-conspirator of these answering defendants or either of them, or of [1217] any defendant herein, and deny that these answering defendants or either of them, or any other defendant herein, at any time or times mentioned in plaintiff's amended complaint

or at all, ever conspired to or with Silzle in any manner, shape or fashion whatsoever.

Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said paragraph (e) other than the allegations specifically mentioned herein.

IV.

Definitions. Defendants here answering assume that the definitions used in paragraph IV of plaintiff's General Allegations are to be restricted to the purposes of plaintiff's amended complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

The Citrus Fruit Industry

(a) For answer to subparagraph (a) of paragraph V of plaintiff's General Allegations, defendants here answering admit that substantially all of the citrus fruit marketed in the United States is produced in the States of California, Florida, Texas and Arizona.

(b) For answer to subparagraph (b) of paragraph V of plaintiff's General Allegations, the defendants here answering deny each, every and all of the allegations of said subparagraph, except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing organization in the [1218] United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in processing (including in the term "processing" the processing of canned single strength orange juice), and allege that EOP processes less than 2% of the canned single strength orange juice produced in the United States, and allege that there is substantial competition from other marketing organizations; and further allege in that regard that approximately 90% of the canned single strength orange juice which is processed in the United States is processed in the State of Florida.

(c) For answer to subparagraph (c) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (c).

(d) For answer to subparagraph (d) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of the allegations contained in said subparagraph (d).

(e) For answer to subparagraph (e) of paragraph V of plaintiff's General Allegations, defendants here answering deny said allegations, and in

that connection allege that in 1951 defendants ELP and EOP advertised the products packed by each of them under the trade-mark Sunkist.

(f) For answer to subparagraph (f) of paragraph V of plaintiff's General Allegations, deny the allegations contained in the first sentence of said subparagraph (f). Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said subparagraph (f).

(g) For answer to subparagraph (g) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as [1219] to the truth of the allegations contained in said subparagraph.

(h) For answer to subparagraph (h) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of said allegations.

(i) For answer to subparagraph (i) of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (i).

(j) For answer to subparagraph (j) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth

of the allegations contained in said subparagraph (j).

VI.

Interstate Commerce

(a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry as a whole includes the matters set forth in said subparagraph, and allege in that regard that the State of Florida is a very important factor in the citrus fruit industry, particularly in the canned single strength orange juice field, canning approximately 90% of all single strength orange juice canned in the United States, and in the frozen orange concentrate field, canning approximately 75% of all frozen orange concentrate canned in the United States.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations, defendants here answering are without knowledge as to the allegations contained in said subparagraph, except that defendants here answering admit that plaintiff's plant was located in the City of Anaheim, California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations, defendants here answering admit said allegations except the allegations regarding the transportation [1220] of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiary EOP and defendant ELP, and the allegation that at defendant Sunkist's

instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States, and allege in that regard that the only transportation of fresh fruit (i.e., fruit intended for fresh fruit channels) from Arizona to the plants of Sunkist and its subsidiary EOP and defendant ELP is a small amount of fruit to defendant Sunkist's citrus distributing plants, and allege that at defendants' instance fresh fruit (i.e., fruit intended for fresh fruit channels) is transported by interstate carriers from California and Arizona between the said states and throughout the United States, and deny that at said defendants' instance canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) For answer to subparagraph (d) of paragraph VI of plaintiff's General Allegations, defendants here answering deny said allegations, except that they admit that during the year 1951 said defendant ELP transported some canned lemon juice by interstate carriers from California to certain other states of the United States.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (e).

(f) For answer to subparagraph (f) of paragraph VI of plaintiff's General Allegations, defend-

ants here answering deny the allegations contained in the first sentence of said subparagraph (f), and defendants here answering are without knowledge of the *allegations* contained in the second sentence of said subparagraph (f), except that defendants here answering admit that a part of the canned orange and grapefruit juices processed by EOP [1221] during the year 1951 and marketed by it through Sunkist was transported in interstate commerce.

VII.

Damages

Deny each, every and all of the allegations of paragraph VII of plaintiff's General Allegations.

VIII.

Threatened Loss and Damage

Deny each, every and all of the allegations of paragraph VIII of plaintiff's General Allegations.

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's first cause of action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications

For answer to paragraph III of plaintiff's First Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit that effective as of July 23, 1951, it entered into an agreement with defendant TreeSweet on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's [1222] Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and that effective as of June 26, 1951, defendant EOP entered into a written agreement with Silzle on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and admit that fruit was supplied to each of said processors under said respective agreements, and except that by oral agreement with defendant EOP, ELP processed for EOP in 1951 at cost and without profit to ELP approximately 28,800 tons of Valencia oranges (some of said oranges were processed into canned single strength juice and some were processed into canned frozen concentrate), and ex-

cept that by oral agreement between ELP and EOP, EOP in 1951 custom packed for ELP, at cost and without profit to EOP, about 1,740 tons of lemons (some of said lemons were processed into canned single strength lemon juice and some were processed into frozen concentrate lemon juice).

Answer to Plaintiff's Second Cause of Action

XII.

For answer to paragraph I of plaintiff's Second Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answers to plaintiffs General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's Second Cause of Action. [1223]

Answer to Plaintiff's Third Cause of Action

XIV.

For answer to paragraph I of plaintiff's Third Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of de-

fendants' answer to plaintiff's First Cause of Action, and paragraph XIII of defendants' answer to plaintiff's Second Cause of Action.

XV.

Section 1 of the Robinson-Patman Act

Deny the allegations of paragraph II of plaintiff's Third Cause of Action.

XVI.

Section 3 of the Robinson-Patman Act

Deny the allegations of paragraph III of plaintiff's Third Cause of Action.

XVII.

Specifications

For answer to paragraph IV of plaintiff's Third Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit the allegations contained in clauses (a), (b), (c) and (d) of said paragraph, and allege in that connection that in 1951 plaintiff's purchases from defendant Sunkist of Valencia oranges aggregated only 21 tons.

XVIII.

Further Specifications

Deny the allegations of paragraph V of plaintiff's Third Cause of Action.

XIX.

Further Specifications

For answer to paragraph VI of plaintiff's Third Cause of Action, defendants here answering deny each, every and all the allegations contained and set forth in said paragraph, except that defendants here answering admit that on or about July 16, 1951, plaintiff wrote defendant EOP a letter, a full, true and correct copy of which is attached hereto marked Exhibit A and by this reference made a part hereof, which letter was received by EOP on July 17, 1951, and allege that defendant EOP did not reply to said letter, and admit that on or about September 28, 1951, plaintiff purchased a carload of canned single strength Valencia orange juice from defendant EOP.

Answer to Plaintiff's Fourth Cause of Action

XX.

For answer to paragraph I of plaintiff's Fourth Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action, and paragraph XIII of defendants' answer to plaintiff's Second Cause of Action, and paragraphs XV, XVI, XVII, XVIII and XIX of defendants' answer to plaintiff's Third Cause of Action.

XXI.

Cartwright Antitrust Act

Deny the allegations of paragraph II of plaintiff's Fourth Cause of Action.

XXII.

Specifications

Deny the allegations contained in pargaraph III of plaintiff's Fourth Cause of Action, and in connection with the acts alleged in said paragraph, defendants here answering incorporate by [1225] this reference their answer contained in paragraph XI of their answer to plaintiff's First Cause of Action and in paragraph XIII of their answer to plaintiff's Second Cause of Action, and in paragraphs XV, XVI, XVII, XVIII and XIX of their answer to plaintiff's Third Cause of Action, as fully as though herein set forth in full.

Answer to Plaintiff's Fifth Cause of Action

XXIII.

For answer to paragraph I of plaintiff's Fifth Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action, paragraph XIII of defendants' answer to plaintiff's Second Cause of Action, paragraphs XV, XVI, XVII, XVIII and XIX of defendants' an-

swer to plaintiff's Third Cause of Action, and paragraphs XXI and XXII of defendants' answer to plaintiff's Fourth Cause of Action.

XXIV.

Unfair Practice Act

Deny the allegations of paragraph II of plaintiff's Fifth Cause of Action.

First Affirmative Defense

For a Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege plaintiff's amended complaint and the General Allegations and the First, Second, Third, Fourth and Fifth Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering or either of them. [1226]

Second Affirmative Defense

For a Second Separate, Distinct and Affirmative Defense to the Fourth and Fifth Causes of Action in Said Amended Complaint, defendants here answering allege that the Court lacks jurisdiction over the subject matter of the said purported causes of action and each of them.

Third Affirmative Defense

For a Third Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to

the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the applicable statute of limitations, namely, by the provisions of Section 338(1) of the Code of Civil Procedure of the State of California.

Fourth Affirmative Defense

For a Fourth Separate, Distinct and Affirmative Defense to the Third Cause of Action of Plaintiff's Amended Complaint, defendants here answering allege that this Court lacks jurisdiction to award damages for a claimed injury resulting from acts violating Section 3 of the Robinson-Patman Act.

Fifth Affirmative Defense

For a Fifth Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's amended complaint involving the E. A. Silzle Corporation are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contract

with Silzle, [1227] referred to in plaintiff's amended complaint was disclosed in the answer of defendants here answering to Interrogatory No. 14 of the interrogatories of plaintiff dated March 14, 1952, which answer was filed herein May 26, 1952. Despite this plaintiff did not amend its complaint to include the Silzle contract until on or about December 15, 1954, when plaintiff served and filed its amended complaint, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or other matters alleged in plaintiff's amended complaint involving alleged co-conspirator Silzle.

Wherefore, defendants here answering pray that plaintiff take nothing by plaintiff's action; that defendants here answering have judgment for their costs incurred herein against plaintiff and intervener, and for such other relief as to the Court may seem meet and proper in the circumstances.

FARRAND, FISHER &
FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants
Here Answering. [1228]

EXHIBIT A

Winckler & Smith Citrus Products Company
Incorporated
General Offices and Plant
408 South Atchison Street
Anaheim, California
P.O. Box 431

Phone Anaheim 2181

July 16, 1951.

Packers of Anagold Brand
Citrus Juices and Concentrates

Exchange Orange Products,
616 E. Grove Street,
Ontario, California.

Attn.: Mr. J. A. Finley.

Dear Mr. Finley:

We are pleased to advise that at the present time we have surplus capacity and we would be prepared to do custom packing for your account on the following items:

A. Single strength citrus juices in any can size from 5 oz. to 1 gallon as requested.

B. Low Temperature concentrate in any customary can size or bulk.

C. Hot pasteurized concentrate in any customary can size or bulk.

In the event you would be interested in our proposition, we would assure you of lowest quotations, strictly Grade A. quality—in case of low temperature concentrate, under your supervision if necessary.

If you are interested, please be kind enough to communicate with the undersigned or, in his absence, with our Mr. Pendergrass.

Very truly yours,

WINCKLER & SMITH CITRUS PRODUCTS CO.,

N. J. WINCKLER,

NICHOLAS J. WINCKLER,
President.

NJW :sd.

Affidavit of service by mail attached.

[Endorsed]: Filed February 21, 1955. [1229]

In the United States District Court, Southern District of California, Central Division
No. 13788—C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, et al.,

Defendants.

ORDER OF DISMISSAL

The plaintiffs having moved for the dismissal of the Amended Complaint as against defendant Exchange Lemon Prod ts Company and against all John Doe defendants named in said Amended Complaint, good cause appearing therefore,

It Is Ordered, Adjudged, and Decreed that the Amended Complaint be, and the same is hereby dismissed with prejudice as to the defendant Exchange Lemon Products Company, and without prejudice as to any John Doe defendants named or referred to therein.

Dated: November 30, 1955.

/s/ JAMES M. CARTER,
Judge, United States District Court.

[Endorsed]: Filed December 1, 1955.

Judgment docketed and entered December 1, 1955. [1380]

[Title of District Court and Cause.]

No. 13788—C

JURY INSTRUCTIONS REQUESTED BY PLAINTIFFS

Plaintiffs request that the attached jury instructions be given by the Court.

Dated: November .., 1955.

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiffs. [1382]

Jury Instruction No. 1

You are not bound to decide any fact or the main issue in conformity with the testimony or the number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses, or as against a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified, but it does mean that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit

is sufficient for the proof of any fact in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses, and after weighing the various other factors in the evidence, the jury believes the one witness.

As given:

U. S. A. v. Local 36
(Southern Dist. of California, Peirson M. Hall, Judge).

Affirmed: Ninth Circuit Court of Appeals, 177 F. (2d) 320; cert. den. Nov. 29, 1949. [1383]

Jury Instruction No. 2

I charge you that the acts of The Exchange Orange Products Company, may be the acts of its parent corporation Sunkist Growers, Inc. I further charge you that a parent corporation and its wholly owned subsidiary can be guilty of conspiring together to violate the antitrust laws. The defendants Sunkist Growers, Inc., and its wholly owned subsidiary Exchange Orange Products Company, can accordingly conspire together to violate Sections 1 and 2 of the Sherman Act as charged in the first and second causes of action.

Keefer-Stewart v. Seagram,
340 U. S. 211; 71 S. Ct. 259. [1384]

Jury Instruction No. 3

The purpose of the antitrust laws is to preserve the freedom of interstate and foreign trade, to secure unrestricted equality to engage in such trade, and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 42;

United States v. First National Pictures, Inc., 280 U. S. 44;

Binderup v. Pathe Exchange, Inc., 263 U. S. 291;

Keifer Stewart v. Seagrams, 340 U. S. 211, 213;

Cinema Amusements, Inc., v. Loew's, Inc., (D.C. Utah, 1952) Ins. No. 3; Judgment affirmed, (C.A. 10, 1954) 210 F. 2d 86;

See: Village Theatres, Inc., v. Paramount Film Distributing Corporation, Inc., C 143-53, (D.C. Utah, 1954) Judge Willis [1385] Ritter.

Jury Instruction No. 4

The Federal Antitrust Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

(Mandeville Island Farms, Inc., v. Amer. Crystal Sugar Co., 334 U.S. 219, 236;

Roseland v. Phister Mfg. Co., 125 F. 2d 416, 419;
Vines v. General Outdoor Adv. Co., 171 F. 2d 487, 490.) [1386]

Jury Instruction No. 5

I charge you that the single-strength orange juice and other citrus juice products produced in California and sold in intra and interstate commerce constitute part of the total trade in commerce in these products and may be the subject of restraint and monopoly under the Sherman Act.

U. S. v. National City Lines, Inc., et al., 186 F. 2d 562 (cert. den. 341 U.S. 916);

Indiana Farmers Guide Publishing Company v. Prairie Farmer Publishing Co., et al., 293 U. S. 268; 55 S. C. 182. [1387]

Plaintiff's Jury Instruction No. 6

Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished

from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that any two or more of the defendants combined together to eliminate the competition of the plaintiff in the market for citrus juice products, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants in the first cause of action were performed, and that the performance of any of such acts was the proximate cause of any damage to the plaintiffs, you should find for the plaintiff on the first cause of action.

Indiana Farmers Guide Publishing Company v. Prairie Farmer Publishing Co., et al., 293 U. S. 268; 55 S. C. 182. [1388]

Plaintiffs' Jury Instruction No. 7

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that any two or more of the defendants combined together as charged in the first and second causes of action to perform any of the acts alleged by the plaintiffs to have been performed as part of the conspiracy or combination charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by any one or more of the defendants that you find were a party to such com-

bination, that the act or acts so committed would then become the act of all members of the combination, and if you find that such acts damaged the plaintiffs, you should find for the plaintiff and against such defendants as were members of or parties to the combination charged in the first and second causes of action.

Atkins v. Wisconsin,
195 U. S. 194-206;

U. S. v. Logan,
130 F. 550;

Swift & Co. v. U. S.,
196 U. S. 375, 396;

Associated Press v. U. S.,
326 U. S. 1-14;

American Tobacco Co. v. U. S.,
328 U. S. 781-809. [1389]

Plaintiffs' Jury Instruction No. 7
Revision No. 1

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that either or both of the defendants combined or conspired with TreeSweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or co-conspirators, that

you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy.

[Note: The Court, on reviewing this instruction, has stricken from the instruction No. 7 as considered, on line 6, the words beginning, "to perform" and following down through line 8, including by striking the words, "second cause of action and that public injury was proven."

The court has also ended the instruction, at line 13 of 7, as it was considered, following the words, "combination or conspiracy" and has stricken the balance of the instruction.] [1390]

Plaintiffs' Jury Instruction No. 8

Plaintiffs need not show that any of the acts which the defendants are alleged to have performed in combination under the first cause of action were done with the specific intent of eliminating the competition of the plaintiffs in the interstate market for citrus juice products. It is sufficient if you find that any acts charged by the plaintiffs to have been done pursuant to the combination alleged in the first cause of action actually resulted in the elimination of the competition of the plaintiffs in such market since everyone is presumed to intend the natural and probable results or consequences of his conduct or business arrangements.

U. S. v. Griffith, et al.,
334 U. S. 100; 68 S. C. 941. [1391]

Jury Instruction No. 9

I charge you that no formal agreement is necessary to constitute a conspiracy or combination. A combination or conspiracy in violation of the law or statute may be inferred from a course of dealing as well as through direct exchange of words. An unlawful conspiracy may, and often is, formed without simultaneous action or agreement on the part of the conspirators. Acceptance without previous agreement or an invitation to participate in a plan, the necessary consequence of which, if carried out, restrains interstate commerce is sufficient to establish an unlawful conspiracy under the antitrust laws. It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon.

Charge to jury:

Brookside Theatre Corporation v. 20th Century Fox Film Corporation, et al., 194 F 2d 846;

Interstate Circuit v. U. S., 306 U.S. 208. [1392]

Jury Instruction No. 10

You are instructed that men or entities who combine for illegal purposes will normally not tell openly everything about their purposes. Thus, it is

often impossible to prove the existence of an illegal agreement by what is known as direct evidence. Very often, particularly in conspiracy cases, there cannot be direct proof of the making or existence of an illegal understanding. The acts of the parties over a period of time, their course of conduct and declarations, either written or oral, and all the surrounding circumstances may then be considered by you for the purpose of determining whether or not an illegal understanding was entered into.

Jury instruction given:

United States v. Standard Oil Co., et al., with adaptations;

Approved United States v. Sacony Vacuum Oil Co., 310 U. S. 150, [1393]

Jury Instruction No. 11

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

As given:

U. S. A. v. Local 36 (Southern Dist. of California, James Carter, Judge);

Affirmed: Ninth Circuit Court of Appeals, 177 F. (2d) 320; cert. den. Nov. 29, [1394] 1949.

Plaintiff's Jury Instruction No. 12

If you find that the effect of the action of Exchange Orange Products Company in entering into the 1951 contracts with Treesweet Products Company and E. A. Silzle Corporation and in refusing to enter into a comparable arrangement with the plaintiffs whereby it could have secured oranges or single-strength Valencia orange juice was to exclude the plaintiff as a competitor of Exchange Orange Products Company, Treesweet Products Company and E. A. Silzle Corporation from a substantial market for single-strength Valencia orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable per se, and you should find for the plaintiffs on the first cause of action.

American Federation of Tobacco Growers v. Neal, 189 F. 2d 869;

Darnell v. Markwood, et al., 220 F. 2d 374;

International Salt Company v. U. S., 32 U. S. 392, 396; 68 S. Ct. 12-15. [1395]

Jury Instruction No. 13

The use of monopoly power, however lawfully acquired. to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.

U. S. v. Griffith,
334 U. S. 100; 68 S. Ct. 941, 945. [1396]

Plaintiffs' Jury Instruction No. 14

The exercise or use of monopoly power, however lawfully acquired, for the purpose of eliminating or excluding a competitor from a defined portion of an industry would violate Section 2 of the Sherman Act.

Indiana Farmers Guide Publishing Company v. Prairie Farmer Publishing Co., et. al.,
293 U.S. 268; 55 S.C. 182. [1397]

Jury Instruction No. 15

The right of a private business concern to select its customers is neither absolute nor exempt from regulation. Its exercise as a purposeful means of maintaining a monopoly is prohibited by the Sherman Act.

Lorain Journal Co. v. U. S.,
342 U. S. 143-154; 72 S. C. 181, 187.

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1398]

Jury Instruction No. 16

If you find that any one of the defendants had the power to exclude the plaintiff from interstate market for single-strength Valencia juice processed in California, and that such defendant or defendants exercised such power by performing any of the acts complained of by the plaintiff with the purpose or intent of excluding the plaintiff from such market, and that any such act or acts damaged the plaintiff, such conduct would violate Section 2 of the Sherman Act, and you should find for the plaintiff and against such defendants or defendant as you find performed such acts on the second cause of action.

U. S. v. Griffith,
334 U. S. 100; 68 S. C. 941, 945. [1399]

Plaintiffs' Jury Instruction No. 17

If you find as a fact that the defendant The Exchange Orange Products Company refused to enter into a custom packing agreement with the plaintiff during the 1951 packing season, comparable to the agreements Exchange Orange Products Company entered into with Treesweet Products Company and E. A. Silzle Corporation, for the purpose of creating or maintaining a monopoly control over or eliminating the competition of plaintiff in that part of the interstate trade and commerce in single-strength Valencia orange juice represented by the single-strength Valencia orange juice processed in California and sold in intra and interstate com-

merce, and that such refusal directly and proximately resulted in any damage to the plaintiff, you should find for the plaintiff and against the defendant The Exchange Orange Products Company on the second cause of action.

Lorain Journal Co. v. U. S.,
342 U. S. 143; 72 S. C. 181;

Gamco, Inc. v. Providence Fruit and Produce Building, Inc., 194 F. 2d 484,
(cert. den. 10/13/52);

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359,
47 S. C. 400, 404;

Associated Press v. U. S.,
326 U. S. 1-14;

U. S. v. Nat'l City Lines, Inc.,
186 F. 2d 562 (cert. den. 341 U. S. 916);

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1400]

Plaintiffs' Jury Instruction No. 18

If you find as a fact that the defendant Exchange Orange Products Company or its parent corporation Sunkist Growers, Inc., refused to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange Products Company made Valencia oranges available to Treesweet Products Company and E. A. Silzle Corporation during the 1951 pack-

ing season for the purpose of creating or maintaining a monopoly control over or eliminating the competition of the plaintiff in that part of the interstate trade and commerce in single-strength orange juice represented by the single-strength Valencia orange juice processed in California and sold in intra and interstate commerce, and that such refusal directly and proximately resulted in any damage to the plaintiff, you should find for the plaintiff and against the defendant or defendants making such refusal on the second cause of action.

Lorain Journal Co. v. U. S.,
342 U. S. 143-154; 72 S. C. 181, 187;

Gamco, Inc., v. Providence Fruit and Produce Building, Inc., 194 F. 2d 484,
(cert. den. 10/13/52);

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359,
47 S. C. 400, 404;

Associated Press v. U. S.,
326 U. S. 1-14;

U. S. v. National City Lines, et al.,
186 F. 2d 562 (cert. den. 341 U. S. 916);

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1401]

Plaintiffs' Jury Instruction No. 19

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the de-

fendant The Exchange Orange Products Company to enter into an agreement with plaintiff comparable to that entered into by The Exchange Orange Products Company in 1951 with Treesweet Products Company and E. A. Silzle Corporation, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange Products Company made Valencia oranges available to Treesweet Products Company and E. A. Silzle Corporation during the 1951 packing season, was pursuant to a purpose on the part of Exchange Orange Products Company or Sunkist Growers, Inc., its parent corporation, to eliminate the competition of the plaintiff in the intra and interstate market for single-strength orange juice or to create or maintain a monopoly or monopoly control over the processing or selling of Valencia single-strength orange juice processed in California and sold in the intra or interstate market as charged in the first and second causes of action. Such a purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence from which just and reasonable inferences to that effect may be drawn.

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359, 375; 47 S. C. 400, 404;

Interstate Circuit v. U. S., 306 U. S. 208;

U. S. v. Griffith, et al., 334 U. S. 100; 68 S. Ct. 941. [1402]

Plaintiffs' Jury Instruction No. 19
Revision No. 1

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the defendant Exchange Orange to enter into an agreement with plaintiff comparable to that entered into by the Exchange Orange Products Company in 1951 with Treesweet and Silzle, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange made Valencia oranges available to Treesweet and Silzle during the 1951 packing season, was pursuant to the combination or conspiracy charged, and a purpose on the part of Exchange Orange or Sunkist, its parent corporation, to eliminate the competition of the plaintiff in the interstate market for single-strength orange juice or to create or maintain a monopoly over the processing or selling of Valencia single-strength orange juice processed in California and sold in the interstate market as charged in the first and second causes of action. Such a combination, conspiracy or purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence and from all just and reasonable inferences which may be drawn.

However, the plaintiff has the burden to prove such matters by a preponderance of the evidence.

[Note: The court has merely had retyped plaintiff's No. 19 and has added the last para-

graph shown, beginning with the word "However."] [1403]

Plaintiffs' Jury Instruction No. 20

Any attempt to monopolize, the actual monopolization of, or the exercise of monopoly power by any of the defendants over the processing in California of single-strength Valencia orange juice for the purpose of excluding competition in the processing and selling of such citrus juice in interstate commerce would violate Section 2 of the Sherman Act. If you find that any one of the defendants attempted to monopolize, monopolized, or exercised monopoly power over such trade and commerce for the purpose of excluding the competition of the plaintiff therein, and that such attempt to monopolize, monopoly, or the exercise of monopoly power by any such defendant directly and proximately damaged the plaintiff, you should find for the plaintiff and against such defendant or defendants on the second cause of action.

U. S. v. National City Lines, Inc., et al., 186 F. 2d 562 (cert. den. 341 U. S. [1404] 916).

Plaintiffs' Jury Instruction No. 21

If you find that the defendant The Exchange Orange Products Company directly or indirectly discriminiated in price between the plaintiff and Treesweet Products Company or E. A. Silzle Corporation in sales of oranges or single-strength Valen-

cia orange juice of like grade and quality and that such discrimination tended to create a monopoly in California Valencia single-strength juice in Sunkist Growers, Inc., or Exchange Orange Products or to injure, destroy or prevent competition with Exchange Orange Products or Sunkist Growers, Inc., by the plaintiff, you should find for the plaintiff on the third cause of action in such amount as represents the damages sustained by the plaintiff as a result of such discrimination.

American Co-Op Serum Ass'n v. Anchor Serum Company, 153 F. 2d 907 (cert. den. 329 U.S. 721). [1405]

Jury Instruction No. 22

I charge you that it is not necessary for the plaintiff to be a purchaser of either oranges or single-strength orange juice from the defendants the Exchange Orange Products Company or Sunkist Growers, Inc., for it to recover under the third cause of action. If you find that the sales of oranges or orange juice under the Treesweet Products Company and E. A. Silzle Corporation contracts tended to create a monopoly in Exchange Orange Products Company, Sunkist Growers, Inc., Treesweet Products Company, or E. A. Silzle Corporation of single-strength Valencia juice or tended to injure, destroy, or prevent competition between the plaintiff and Exchange Orange Products Company or Sunkist Growers, Inc., or the purchasers of oranges

or Valencia orange juice from Exchange Orange Products Company or Sunkist Growers, Inc., and that such acts by Sunkist Growers Inc., or Exchange Orange Products Company damaged the plaintiff, you should find for the plaintiff and against such defendants in such amount as plaintiff has suffered in damages as a result of such acts.

American Co-Op Serum Ass'n v. Anchor Serum Company, 153 F. 2d 907 (cert. den. 329 U.S. 721). [1406]

Jury Instruction No. 23

If you as jurors should determine that plaintiffs' business or property was injured by activities in restraint of trade, the question will arise as to how plaintiffs' damages should be computed. One whose business or property has been injured by the activities of a combination in restraint of trade is entitled to damages. Since proof of the damages suffered may be difficult, "The wrongdoer may not object to the plaintiffs' reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * * and is not restricted to proof of damage in antitrust suits, although their char-

acter is such as frequently to call for its application."

Speegle v. Board of Fire Underwriters,
29 Cal. 34, 46.

Citing and quoting Bigelow v. RKO Radio Pictures, Inc., et al., 327 U.S. 251. [1407]

Jury Instruction No. 23
Revision No. 1

If you as jurors, based on all the evidence and instructions in this case should determine that plaintiff's business or property was injured and that the defendants or either of them is liable therefore, the question will arise as to how plaintiff's damages should be computed. Since proof of the damages suffered may be difficult, a "wrongdoer may not object to the plaintiffs' reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

[Note: The court has revised a portion of the language appearing on line 2 of the instruction No. 23 as heretofore considered. The court has also struck out the balance of the quote appearing on lines 13, 14 and 15 of the instructions as originally considered.] [1408]

Jury Instruction No 24

"A tortfeasor is liable for all consequences naturally resulting, all injuries actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. Recoverable damages, therefore, include compensation for all injury to plaintiff's business arising from wrongful acts committed by defendant, provided such injury was the natural and proximate result of the wrongful acts. This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. These are governing principles applying to compensatory damages * * * whether damages be compensatory or exemplary, if unliquidated, when determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts, * * *."

Quotation from:

Aladdin Mfg. Co. v. Mantel Lamp Co. of America, 116 F. 2d 708, 716, 717. [1409]

Plaintiffs' Jury Instruction No. 25

I charge you that the law permits you to take into account both the damages which were inflicted on existing property and damages which were sustained by being unable to make profits which rea-

sonably could be anticipated and would have been realized had it not been for the wrongdoing of the defendants.

Cape Cod Food Products v. Nat'l Cranberry Ass'n, 119 F. Supp. 900. [1410]

Jury Instruction No. 26

Section 7 of the same Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

You are not to be concerned at all with the treble damages or the costs of suit or the attorneys' fees, and are not to be influenced one way or the other by reason of the fact that the act provides therefor. As I will later tell you in more detail, your interest will be solely with respect to actual damages, and that only in the event that you shall first find under the law and facts that the plaintiffs are entitled to a recovery. [1411]

Jury Instruction No. 27

It is not in dispute that Treesweet and Silzle were selling single-strength orange juice in interstate

commerce in competition with single-strength orange juice processed by Exchange Orange and sold by Sunkist in interstate commerce. It is illegal per se and in violation of the Sherman Antitrust Law for any two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products which such companies sell shall be sold in interstate commerce. If, therefore, you find that the 1951 Treesweet or Silzle contracts had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, Treesweet or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining whether such contracts were in fact processing contracts or whether they were in fact entered into as part of a conspiracy to restrain interstate commerce or to monopolize or control the production and sale of California single-strength Valencia orange juice in interstate commerce as charged by the plaintiff. [1412]

Plaintiff's Jury Instruction No. 28

Agreements which create potential power for price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints on interstate commerce within the meaning of the Sherman Act.

U. S. v. Trenton Potteries Company,
273 U. S. 392, 47 S. C. 377; quoted with approval in

U. S. v. Socony Vacuum Oil Co., et al.,
310 U. S. 150; 60 S. C. 811, 842. [1413]

Plaintiff's Jury Instruction No. 29

Any combination which tampers with price structures is engaged in an illegal activity. Even though the members of the price fixing group are in no position to control the market, to the extent that they raise, lower, or stabilize prices, they would be directly interfering with the free play of market forces. The Sherman Act places all such schemes beyond the pale and protects that vital part of an economy against any degree of interference.

U. S. v. Socony Vacuum Oil Company, et al.,
310 U. S. 150, 221. [1414]

Plaintiff's Jury Instruction No. 30

I charge you that while the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract, that processing contracts cannot be entered into by Exchange Orange as part of a scheme or plan which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by Treesweet and Silzle for Exchange Orange may be sold or offered for sale by Treesweet or Silzle in interstate commerce as such contracts would then be illegal contracts. [1415]

Plaintiff's Jury Instruction No. 31

If you find that the plaintiff in 1951 requested either Sunkist or Exchange Orange to make Valencia oranges available to it for processing into single-strength Valencia orange juice on any basis that would have enabled the plaintiff to have acquired oranges or such juice from Exchange Orange or Sunkist and to have sold the same in interstate commerce in competition with that sold by Treesweet or Silzle in interstate commerce, and that Sunkist or Exchange Orange refused to make Valencia oranges available to the plaintiff while at the same time making them available to Treesweet or Silzle on a basis whereby Treesweet or Silzle acquired such juice and sold it in interstate commerce, and that such refusal by Sunkist or Exchange Orange operated to prevent the plaintiff from being able to process and sell any California single-strength Valencia orange juice in interstate commerce in competition with that sold by Treesweet or Silzle, I charge you that if the plaintiff could not have secured California Valencia oranges from any other source on a basis that would have enabled it to have processed such oranges into single-strength Valencia juice and sold it in interstate commerce in competition with that processed by Treesweet and Silzle under their 1951 agreements with Exchange Orange, that you might consider such refusal as evidence of the existence of the combination and conspiracy alleged by the plaintiff to be in violation of Sections 1 and 2 of the Sherman Antitrust Law. [1416]

Plaintiff's Jury Instruction No. 32

Any combination effectively excluding or trying to exclude outsiders from the business altogether is a monopoly or an incipient monopoly and is unconditionally unlawful.

American Federation of Tobacco Growers, Inc., v. Neal, et al., 183 Fed. (2d) [1417] 869.

Plaintiff's Jury Instruction No. 33

In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

United States v. Aluminum Co. of America, 91 F. Supp. 332, 342. [1418]

Plaintiff's Jury Instruction No. 34

Monopoly power is the power to exclude a competitor from a market. Such power may, however, be lawfully acquired. If you find that the defendants Sunkist and Exchange Orange Products had such power, they could lawfully exercise it in the case before you by deciding to process or retain for their own use all of the product oranges of their grower members. They could even destroy such oranges if they cared to do so, but when Sunkist or Exchange Orange Products offered to make them available to independent processors by sale or under other arrangements and made them available to their competitors such as Treesweet or Silzle, then

Sunkist or Exchange Orange must exercise their monopoly power over the product oranges of their grower members in such a manner as not to restrain competition in any citrus juice products that may be processed therefrom. [1419]

Plaintiff's Jury Instruction No. 35

I charge you that even though the defendants Sunkist and Exchange Orange Products might lawfully have a monopoly control over the product oranges available in California for processing into citrus juice products, such control could not be exercised by them or either of them to extend such control over citrus juice processed in California and sold in interstate commerce by means which had the necessary effect of eliminating a competitor or eliminating competition in such products as such action would restrain interstate trade and commerce. If, therefore, you find that Sunkist and Exchange Orange Products, or either of them, were endeavoring to extend their control into such market by making contracts with independent processors, Treesweet and Silzle, and that as part of such scheme or plan they refused to make oranges available to the plaintiff under comparable arrangements, and that such refusal eliminated the plaintiff as a competitor of Sunkist, Treesweet and Silzle in such market and caused the plaintiff damage, you should find for the plaintiff.

U. S. v. Griffith,
334 U. S. 100, 106;
68 S. Ct. 941, 945. [1420]

Plaintiff's Jury Instruction No. 36

If you find as a fact that the defendants Sunkist and EOP exercised such control over the price and amount of California product Valencia oranges in 1951 that they had the power to determine the price and quantity of Valencia oranges that were available to independent processors in California for making single-strength Valencia juice or other citrus juice products, such power would constitute monopoly power.

If you find that either Sunkist or EOP or both together had such power, it would not, however, have been illegally acquired in violation of the antitrust laws as they could legally acquire such power as corporations organized under Federal and state laws which permit producers of agricultural products such as oranges to combine together in organizations comparable to that of the defendants Sunkist and Exchange Orange Products for the purpose of marketing and processing the products of their members in interstate commerce. Such laws do not, however, permit Sunkist or Exchange Orange Products to combine together with an independent processor such as Treesweet and Silzle for the purpose of restraining, monopolizing, or otherwise controlling trade and commerce in citrus juice products, such as single-strength Valencia juice or frozen orange concentrates that are processed in California from such oranges and thereafter sold in interstate commerce. [1421]

Plaintiff's Jury Instruction No. 37

The defendant Sunkist is permitted under the law to acquire a legal monopoly over the amount of Valencia oranges that are available to independent processors for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange Products could in 1951 have processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the plaintiff, Treesweet or Silzle, if they had cared to do so. Defendant Exchange Orange Products, as the processing company for the grower members of Sunkist, could also enter into valid processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof in interstate commerce. However, such contracts must be true processing contracts and not devices which are resorted to, to restrain trade or to monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange Products entered into in 1951 with Treesweet and Silzle were true processing contracts or whether they were contracts which had the purpose and effect of extending the monopoly control of Sunkist and Exchange Orange Products over the

citrus juices that are processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts. Such latter effect, when coupled with any refusal of the defendant Sunkist or Exchange Orange Products to make oranges available to the plaintiff under comparable arrangements would render such contracts in violation of the antitrust laws for which the plaintiff would be entitled to recover such damages as you find proximately resulted from such refusal. [1422]

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Plaintiff's Suggested Instruction on Exercise of Monopoly Power by Defendants

It is for you to decide whether the defendants, Sunkist or Exchange Orange or either of them, had such power or control over the amount of product oranges that were available in 1951 to independent processors for processing into citrus juice products, that they or either of them were able, in fact, to determine the price or terms and conditions at which product oranges would be made available to independent processors by the defendants and any other actual or potential supplier of product Valencia oranges, for processing into citrus juice products, particularly single-strength Valencia juice processed from product Valencia oranges in California in 1951.

[Endorsed]: Filed December 7, 1955. [1424]

[Title of District Court and Cause.]

No. 13788-C

MOTION BY SUNKIST GROWERS, INC. AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO DISMISS THE FOURTH AND FIFTH CAUSES OF ACTION

Come now Sunkist Growers, Inc., and The Exchange Orange Products Company, defendants herein, and move for a judgment of dismissal of the fourth and fifth causes of action of the amended complaint upon the ground that the Court lacks jurisdiction of the subject matter of the said purported causes of action and each of them.

This motion is based upon the records and files herein. [1428] and upon the Memorandum of Points and Authorities attached hereto.

Dated this 13th day of December, 1955.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
DEC. 13, 1955

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff and Intervening Plaintiff: Wm. C. Dixon;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co.: Ferris E. Hurd, Melville C. Williams, Ross C. Fisher, and Donald D. Stark.

Proceedings:

For jury trial. At 9:45 a.m. court convenes in Chambers out of the presence of the jury panel.

Defendants move to dismiss the fourth and fifth causes of action herein, and written motion thereon is now filed, and It Is Ordered that said motion is granted.

Court and counsel confer re procedure. At 10:05 a.m. court recesses.

At 10:10 a.m. court reconvenes herein in the courtroom, and all parties being present as before, and both sides answering ready, Court orders that a jury be impaneled, and trial proceed.

The following jurors, duly impaneled, are sworn to try this cause:

1. Charles W. Daiker
2. Morris D. Weiner
3. Marshall S. Chlavin
4. Joseph Rendler
5. Rachel A. Rhoads
6. Tillie H. Johnson
7. Arthur W. Niebling
8. Sophie Adelman
9. Martha S. Stronach
10. Joseph C. Berger
11. Nairn Johnstone
12. Eleanor Wells

Alternate Jurors: (1) Harriette Colby and (2) Louis Duber.

At noon Court admonishes the jurors not to discuss this cause and declares a recess to 2 p.m. At 2 p.m. court reconvenes herein, and all parties being present as before, and the jury being present,

Attorney Dixon makes opening statement to the jury for plaintiffs.

At 3:15 p.m. Court reminds the jurors of the admonition heretofore given and declares a recess. At 3:30 p.m. court reconvenes herein, and all parties being present as before, the jury being absent:

Defendents object to the introduction of any evidence and move to dismiss the action on the grounds (1) that plaintiffs in their opening statement have

failed to state a claim upon which relief can be granted, and (2) that the second amended complaint fails to state a claim upon which relief can be granted.

It Is Ordered that said objections are overruled and the motion of defendants to dismiss is denied as to each ground.

At 3:40 p.m. the jury is brought into court, and the jury now being present, it is ordered that trial proceed.

Attorney Hurd makes opening statement to the jury for defendants.

At 4:35 p.m. Court admonishes the jurors not to discuss this cause and Orders cause continued to 10 a.m., Dec. 14, 1955, for further jury trial.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1444]

[Title of District Court and Cause.]

No. 13788 C

JURY INSTRUCTIONS REQUESTED BY DEFENDANTS

Defendants request that the attached jury instructions be given by the Court.

Dated: January 10, 1956.

Respectfully submitted,

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Defendants' Jury Instruction No. A

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the first cause of action. You will therefore return a verdict for defendants on the charge that they, or either of them, have violated Section 1 of the Sherman Act. [1468]

Defendants' Jury Instruction No. B

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the second cause of action. You will therefore return a verdict for defendants on the charge that they or either of them have violated Section 2 of the Sherman Act. [1469]

Defendants' Jury Instruction No. C

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the third cause of

action. You will therefore return a verdict for the defendants on the charge that they or either of them have violated the Robinson-Patman Act. [1470]

Defendants' Jury Instruction No. 1

On every issue in the case plaintiff has the burden of proof. That is, if your minds are in even balance on any issue, you must decide that issue for the defendants and not for the plaintiff. The plaintiff does not have to persuade you beyond a reasonable doubt, but it does have to persuade you that its is the more probable version.

Cape Cod Food Products Co. v. National Cranberry Ass'n, 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1471]

Defendants' Jury Instruction No. 2

If evidence is presented with respect to conduct which appears to you to be equivocal, that is to say, susceptible of being interpreted as lawful and, in your view, equally susceptible of being interpreted as unlawful, you must intepret it as being lawful. If you are persuaded that the conduct is equally consistent with a lawful motive and an unlawful motive, you must interpret it as being lawful.

Cape Cod Food Products Co. v. National Cranberry Ass'n, 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1472]

Defendants' Jury Instruction No. 3

You are instructed that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon, component parts of the Sunkist cooperative marketing organization, are cooperatives entitled to the exemptions from the antitrust laws afforded by Section 6 of the Clayton Act, which is one of the antitrust laws, and by Section 1 of the Capper-Volstead Act, which relates to associations of producers of agricultural products. Section 6 of the Clayton Act provides that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of agricultural organizations instituted for the purposes of mutual help, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof, nor shall such organizations or their members be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. Section 1 of the Capper-Volstead Act provides that fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, the fruit of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; provided that such associations are operated for the

mutual benefit of the members thereof, as such producers.

Sec. 6 of Clayton Act (15 U.S.CA., Sec. 17)

Sec. 1 of Capper-Volstead Act (7 U.S.C.A., Sec. 291)

The California Fruit Growers Exchange System, U. S. Dept. of Agric., Washington, D.C., Circular C-135, May 1950. [1473]

Defendants' Jury Instruction No. 4

You are further instructed that defendant Sunkist is in legal effect a single cooperative marketing organization, consisting of a number of components including defendant Exchange Orange and alleged co-conspirator Exchange Lemon, and that this cooperative marketing organization, being in effect a single entity is, as a matter of law, incapable of conspiring with or within itself. [1474]

Defendants' Jury Instruction No. 5

There can be no conspiracy unless more than one person is involved. The very word conspiracy means "together with." Therefore, since defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon are to be regarded by you as a single cooperative marketing organization, that is, one person, you may not find that there was any conspiracy in this case, either a conspiracy to restrain trade or a conspiracy to monopolize trade.

unless you find from a preponderance of the evidence that either Treesweet or Silzle was a party to such a conspiracy. [1475]

Defendants' Jury Instruction No. 6

With respect to the first and second causes of action, it is essential that plaintiff allege and prove a violation of the Sherman Act and injury to plaintiff proximately resulting therefrom. Injury to plaintiff alone, however, is not sufficient, even though it causes him to go out of business. There must be harm to the general public in the form of an undue restriction upon interstate trade and commerce, and the injurious effect upon the public interest must be appreciable. Unless you find, therefore, from a preponderance of the evidence, that the alleged wrongful conduct of the defendants, in some appreciable fashion restrained the movement of citrus fruit juices in interstate commerce, your verdict must be for the defendants on both the first and second causes of action. That is to say, if you find from the preponderance of the evidence that plaintiff alone was injured, from whatever cause, and that there was no substantial injury to the marketing of citrus fruit juices in interstate commerce, your verdict must be for the defendants on the first two causes of action.

Shotkin v. General Electric Co.,
171 F. (2) 236, and other cases cited on p. 12 of Defendants' Trial [1476] Memorandum.

Defendants' Jury Instruction No. 7

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, Treesweet Products Company, and E. A. Silzle Corporation, combined and conspired with each other and entered into contracts and did certain other things in 1951 for the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced in California and marketed throughout the United States, with resultant injury and damage to the plaintiff. What is actually charged by the first cause of action, in view of the evidence in this case, is that the defendants and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juice in the year 1951. Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or Exchange Lemon, or one or more of them, combined and conspired with either Treesweet Products Company or E. A. Silzle Corporation, and in 1951 did the specific things charged in the first cause of action with the specific purpose and effect of eliminating the competition of plaintiff in the interstate market for canned citrus fruit juice, your verdict must be for the defendants on the first cause of action. [1477]

Revision No. 1
Defendants' Jury Instruction No. 7

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, Treesweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiffs.

Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either Treesweet or Silzle, and in 1951 did one or more of the specific acts charged in the first cause of action, and that such act or acts had the purpose or effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valen-

cia orange juice, your verdict must be for the defendants on the first cause of action. [1478]

Defendants' Jury Instruction No. 8

You are instructed that the specific acts charged in the first cause of action must have been done with the specific intent of eliminating plaintiff as a competitor in the interstate market for canned citrus fruit juice, because the disappearance of plaintiff as a competitor was not the necessary and direct result of these specific acts, and in such case, the law requires proof by a preponderance of the evidence, not only that plaintiff disappeared as a competitor but that the alleged conspirators specifically intended this result.

U. S. v. Griffith,
334 U. S. 100

Times-Picayune v. U. S.,
345 U. S. 594 [1479]

Defendants' Jury Instruction No. 9

You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single-strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged

in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned. [1480]

Defendant's Jury Instruction No. 9a

You are instructed that there was nothing unlawful per se, that is, in and of itself, in any of the six specific acts complained of by the plaintiff. Except as you may find, therefore, from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in the first cause of action and with the specific purpose and the effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce, you will disregard such acts as being of no consequence in this case, so far as the first cause of action is concerned. [1481]

Defendants' Jury Instruction No. 9-A
(1st Revision)

The plaintiff claims that the six acts complained of were performed pursuant to a combination or conspiracy to restrain or monopolize interstate commerce and that it was injured by reason of the per-

formance of one or more of these acts. Each of these acts standing by itself and apart from any combination or conspiracy was lawful. Except as you may find therefore from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff in the market for citrus fruit juice processed in California and sold in interstate commerce, you will disregard such acts as being the cause or causes of plaintiff's alleged damage. [1482]

Defendants' Jury Instruction No. 10

You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned. [1483]

Defendants' Jury Instruction No. 9A

You are instructed that there was nothing unlawful per se, that is, in and of itself, in any of the six specific acts complained of by the plaintiff. Except as you may find, therefore, from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in the first cause of action and with the specific purpose and the effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce, you will disregard such acts as being of no consequence in this case, so far as the first cause of action is concerned. [1484]

Defendants' Jury Instruction No. 11

You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being of no consequence in this case, so far as the first cause of action is concerned. [1485]

Defendants' Jury Instruction No. 12

You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged coconspirator Tree-Sweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged coconspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned. [1486]

Defendants' Jury Instruction No. 13

You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, effective June 26, 1951; and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, as being of no consequence in

this case, so far as the first cause of action is concerned. [1487]

Defendants' Jury Instruction No. 14

You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged coconspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned. [1488]

Defendants' Jury Instruction No. 14a

It is also charged in the first cause of action that, as a result of the alleged conspiracy between Sunkist, Exchange Orange, Exchange Lemon, TreeSweet, and Silzle, and of the six acts claimed to have been performed by them pursuant to the alleged conspiracy, Sunkist determined, dominated and controlled the price at which single-strength Valencia orange juice was sold in interstate com-

merce by TreeSweet and Silzle in 1951, and all price competition between Sunkist, TreeSweet and Silzle was eliminated. Unless you find from the preponderance of the evidence that the alleged price control and elimination of competition so charged was done pursuant to the conspiracy charged in the first cause of action and with the purpose and effect of eliminating the competition of the plaintiff, you will disregard such charge as being of no consequence in this case; and you will disregard such charge in any event, unless you also find from the preponderance of the evidence that Sunkist or Exchange Orange entered into an agreement or agreements with TreeSweet or Silzle fixing the prices at which TreeSweet or Silzle resold single-strength Valencia orange juice purchased from Exchange Orange, or unless you find from the preponderance of the evidence that the discounts at which Exchange Orange sold such juice to TreeSweet and Silzle were not sufficient to permit price competition between Sunkist and TreeSweet or Sunkist and Silzle. [1489]

Defendants' Jury Instruction No. 14b

The first question you should decide under the second cause of action is whether the preponderance of the evidence establishes that citrus fruit juices produced in California are so different and distinct competitively from citrus fruit juices produced in Florida that they constitute an identifiable segment of the total interstate trade and commerce

in citrus fruit juices produced in the United States as a whole. Unless you find from the preponderance of the evidence that Florida and California citrus fruit juices are not substantially the same and that one has an appreciable competitive advantage over the other in the market place, your verdict must be for the defendants on the second cause of [1490] action.

Defendants' Jury Instruction No. 15

The second cause of action alleges, among other things, that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon have a monopoly control over fruit grown and available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other antitrust act, for Capper-Volstead Cooperatives, such as defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon admittedly are, to acquire a large or even 100% of the citrus fruit grown in California and Arizona, if they do so solely through cooperative or collective action authorized by the Capper-Volstead Act. There is no evidence in this case that the fruit grower members of defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon, or all or any one of the three cooperatives, established or increased their membership, and consequently the combined fruit-growing acreage of their members, in any manner which was contrary

to the provisions of the Capper-Volstead Act. You are instructed, therefore, that there was nothing unlawful about the size of the membership or the acreage or the amount of the citrus fruit produced in the Sunkist system.

Cape Cod Food Products Co. v. National Cranberry Ass'n., 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1491]

Defendants' Jury Instruction No. 16a

You are instructed that you may not find that defendants Sunkist or Exchange Orange had monopoly control or power over the production and distribution of products oranges unless you find from the preponderance of the evidence that defendant Sunkist or Exchange Orange had the power to exclude others from producing or distributing or selling products oranges or the power to determine the prices at which others sell products [1493] oranges.

Defendants' Jury Instruction No. 16

You are further instructed that, so far as oranges are concerned, there has been no showing that defendants Sunkist and Exchange Orange had monopoly control or power over fruit grown and available for processing in California and Arizona. The evidence is that in 1951 grower-members of the Sunkist system produced approximately 65% of the products oranges. There has been no showing of

power to exclude others from growing products oranges. Hence, you may not find from the evidence in this case that defendants Sunkist and Exchange Orange had monopoly control or power over products oranges.

U. S. v. Griffith,
334 U.S. 100.

U.S. v. Aluminum Co. of America,
148 F. (2) 416, 424. [1492]

Defendants' Jury Instruction No. 16b

The term "monopolize" as it is used in Section 2 of the Sherman Act, means to acquire or retain effective market control for the purpose of excluding competition, and to follow such a course of action with the purpose of monopolizing.

U.S. v. Griffith,
334 U.S. 100. [1494]

Defendants' Jury Instruction No. 17

The second cause of action charges that, by doing the same six specific things charged in the first cause of action, defendants Sunkist and Exchange Orange and coconspirator Exchange Lemon have attempted to monopolize and have in fact monopolized the business of processing fruit juice in California and selling it in interstate commerce, with resultant injury and damage to plaintiff. As the Court has already instructed you, the term "monopolize" as it is used in Section 2 of the Sherman Act, means

to acquire or retain effective market control for the purpose of excluding competition, and to follow such a course of conduct with the intent of monopolizing. What the second cause of action really charges, therefore, in view of the evidence which has been presented in this case, is that defendants Sunkist and Exchange Orange, by doing the specific acts charged in the first cause of action, have attempted to obtain and in fact have obtained effective control of the interstate market for California single strength Valencia orange juice, with the intent and effect of excluding the competition of plaintiff. Unless, therefore, you find, from the preponderance of the evidence, that defendants Sunkist and Exchange Orange, by doing the same specific acts which are charged in the first cause of action, either attempted to obtain or actually obtained effective control of the interstate market for California single strength Valencia orange juice, with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in such market, your verdict must be for the defendants on the second cause of action. [1495]

Defendants' Jury Instruction No. 17a

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged coconspirators Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first

cause of action, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon, or one or more of the defendants, combined and conspired with either TreeSweet or Silzle, and pursuant to such combination and conspiracy did the same specific acts charged in the first cause of action, in order to acquire effective control of the interstate market for California citrus fruit juices, with the specific intent and effect of excluding substantially all competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action. [1496]

Defendants' Jury Instruction No. 18

You are instructed that the specific acts charged in the second cause of action must have been done with the specific intent of excluding the plaintiff as a competitor in the interstate market for California single strength Valencia orange juice, because the exclusion of plaintiff as a competitor was not the necessary and direct result of these specific acts, and in such case the law requires proof by a preponderance of the evidence, not only that plaintiff was ex-

cluded as a competitor but that plaintiff's exclusion as a competitor was specifically intended.

U.S. v. Griffith,
334 U.S. 100.

Times-Picayune v. U.S.,
345 U.S. 594. [1497]

Defendants' Jury Instruction No. 19

The second cause of action also charges that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon conspired to monopolize the business of processing fruit juice in California and selling it in interstate commerce. But, as you have already been instructed, defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon are in legal effect a single entity, and therefore are not capable of entering into a conspiracy. You will, therefore, disregard and concern yourselves no further with the charge that Sunkist, Exchange Orange and Exchange Lemon entered into a conspiracy to monopolize any part of interstate commerce. [1498]

Defendants' Jury Instruction No. 20

You are instructed again in connection with the second cause of action that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single-strength orange juice for Ex-

change Orange at cost and without profit to Exchange Lemon, and unless you find, from the preponderance of the evidence, that such agreement or arrangement was entered into by Exchange Orange with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement or arrangement as being of no consequence in this case, so far as the second cause of action is concerned. [1499]

Defendants' Jury Instruction No. 21

You are instructed again in connection with the second cause of action that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange, and, unless you find from the preponderance of the evidence, that such agreement or arrangement was entered into by Exchange Lemon or Exchange Orange with the specific intent of excluding and with the effect of excluding the competition of plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement or arrangement as being of no consequence in this case, so far as the second cause of action is concerned. [1500]

Defendants' Jury Instruction No. 22

You are instructed again in connection with the second cause of action that there was nothing unlawful in Sunkist's setting its own price on by-product Valencia oranges available to independent processors at $40.00 per ton in 1951, and unless you find, from the preponderance of the evidence that Sunkist set such price with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard the setting of such price for Valencia oranges as being of no consequence in this case, so far as the second cause of action is concerned. [1501]

Defendants' Jury Instruction No. 23

You are instructed again in connection with the second cause of action that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged coconspirator TreeSweet Products Company, effective as of July 23, 1951, and unless you find, from the preponderance of the evidence, that defendant Exchange Orange made such contract with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement as being of no consequence in this case, so far as the second cause of action is concerned. [1502]

Defendants' Jury Instruction No. 24

You are instructed again in connection with the second cause of action that there was nothing unlawful in the contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, effective June 26, 1951, and unless you find, from the preponderance of the evidence, that Exchange Orange made this contract with the specific intent of excluding, and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement as being of no consequence in this case, so far as the second cause of action is concerned. [1503]

Defendants' Jury Instruction No. 25

You are instructed again in connection with the second cause of action that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into with alleged coconspirators, TreeSweet Products Company or E. A. Silzle Corporation, and unless you find that defendant Exchange Orange made such refusal with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such refusal as being of no consequence in

this case, so far as the second cause of action is concerned. [1504]

Defendants' Jury Instruction No. 25a

The laws of the United States do not require that persons engaged in private trade and commerce must deal with everyone. They may not always discriminate between those with whom they deal, but they do have the right to choose their customers. Section 2(a) of the Robinson-Patman Act itself provides that "Nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Chicago Seating Co. v. S. Karpen & Bros., 177 D. (2) 863.

Naifeh v. Ronson Art Metal Works, 218 F. (2) 202. [1505]

Defendants' Jury Instruction No. 25b

You are instructed that it would not have been unlawful for defendants Sunkist or Exchange Orange Products Company, to have sold or offered to sell Valencia oranges at one price for processing into hot-pack or frozen concentrated orange juice, and at a different price for processing into single-strength orange juice, provided that there were valid business reasons in the citrus industry for such a dual pricing system, and provided further

that such sales or offers to sell were not made for the purpose of eliminating and suppressing interstate competition. By the same token, it was not unlawful for defendants Sunkist or Exchange Orange to sell or offer to sell Valencia oranges or contract to sell them to processors of hot-pack or frozen concentrated orange juice at one price and at the same time arrange with other processors, such as TreeSweet and Silzle, to process oranges into single-strength orange juice for the account of Exchange Orange and then to buy the single-strength orange juice from Exchange Orange, for sums which returned to Exchange Orange a lesser price, provided that there were valid business reasons in the citrus industry for selling oranges and orange juice in this fashion, and provided further that such sales or offers or contracts to sell, and such processing arrangements, were not made for the purpose of eliminating and suppressing interstate competition. Your verdict in this case must be for the defendants, therefore, unless you find, from the preponderance of the evidence, that defendant Sunkist fixed a price of $40 per ton for Valencia oranges, and defendant Exchange Orange entered into the TreeSweet and Silzle contracts [1506] without valid business reasons and with the purpose of eliminating and suppressing competition from the plaintiff.

Maryland & Virginia Milk Prop. Assn. v. United States, 193 F. 2d 907 (C.A.D. of C., 1951). [1507]

Defendants' Jury Instruction No. 25c

You are instructed that defendant Exchange Orange was under no legal obligation to enter into processing contracts, that is, contracts comparable to those entered into with TreeSweet Products Company and E. A. Silzle Corporation, with any independent processor at all; and you are further instructed that unless defendant Exchange Orange Products Company had an unlawful motive or purpose, it had a perfect right to enter into processing contracts with one or more independent processors of its own choice, and was under no legal obligation to enter into a comparable processing contract with the plaintiff or with any other independent processor with whom it did not choose to do business. Your verdict in this case must be for the defendants, therefore, unless you find that defendant Exchange Orange, in refusing to enter into a processing contract with the plaintiff comparable to the processing contracts entered into with TreeSweet Products Company and E. A. Silzle Corporation, was motivated by a purpose to restrain or eliminate competition from the plaintiff in the processing and interstate selling of single strength Valencia orange juice. [1508]

Defendants' Jury Instruction No. 25d

This case really turns upon the question whether defendant Exchange Orange refused, without valid business reasons, to make Valencia oranges or Valencia orange juice available to plaintiff in 1951, on

terms comparable to the TreeSweet or Silzle contracts and whether Exchange Orange did this as part of and pursuant to the conspiracies to restrain or monopolize interstate trade in California citrus fruit juices, especially single-strength Valencia orange juice, charged in the first and second causes of action. Exchange Orange itself was under no legal obligation to enter into contracts, comparable to the TreeSweet or Silzle contracts, with any independent processor at all. It had a perfect right, acting alone, to enter into processing contracts with one or more independent processors of its own choice and was under no legal obligation to enter into comparable processing contracts with the plaintiff or any other independent processor with whom it did not choose to do business. Unless you find from the preponderance of the evidence that the refusal of defendant Exchange Orange to make Valencia oranges or Valencia orange juice available to plaintiff in 1951 on terms comparable to the TreeSweet or Silzle contracts was without valid business reasons, and that such refusal was not the independent decision of Exchange Orange but was made pursuant to one or the other of the conspiracies charged in the first or second causes of action, your verdict must be for the defendants. [1509]

Defendants' Jury Instruction No. 25-1

It is also charged in the second cause of action that as part of the alleged conspiracy to monopolize and the monopolization effected by defendants Sun-

kist and Exchange Orange and coconspirators Exchange Lemon, TreeSweet, and Silzle, defendants Sunkist and Exchange Orange entered into agreements with Hyland-Stanford under which Sunkist sold oranges to this company to be processed and sold by it as hot pack concentrate orange juice and under which Exchange Orange obtained "first call" on the excess processing facilities of said company for processing hot pack concentrate orange juice, to the exclusion of other marketing cooperative organizations such as Independent Fruit Growers Association, whose fruit was sold through Morgan Ward. Unless you find from the preponderance of the evidence that these agreements with Hyland-Stanford were entered into as a part of a conspiracy between Sunkist, Exchange Orange, Exchange Lemon, TreeSweet and Silzle to monopolize the processing and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, for themselves, you will disregard such contracts as being of no consequence in the case, except as you may infer from them that in 1951, the Independent Fruit Growers Association had a greater than usual supply of Valencia oranges available for their regular customers, including the plaintiff. [1510]

Defendants' Jury Instruction No. 26

The third cause of action charges that defendant Sunkist or defendant Exchange Orange, or both of them violated Section 2(a) of the Robinson-Patman

Act in 1951 by discriminating in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit or juices processed therefrom, one or more of the purchases involved in such discrimination being in interstate commerce. The evidence in this case shows that none of the allegedly discriminatory sales made by either of the defendants Sunkist or Exchange Orange of by-product fruit or juices processed therefrom, were made in interstate commerce. You are instructed, therefore, that your verdict must be for the defendants on the charge that they, or either of them, violated Section 2(a) of the Robinson-Patman Act.

Myers v. Shell Oil Co.,
97 F. Supp. 670.

Lewis v. Shell Oil Co.,
50 F. Supp. 547.

Spencer v. Sun Oil Co.,
94 F. Supp. 408. [1511]

Defendants' Jury Instruction No. 27

The third cause of action charges that defendant Sunkist violated Section 2(a) of the Robinson-Patman Act when it sold approximately 21 tons of Valencia oranges to plaintiff in April, 1951, at a price alleged to discriminate against plaintiff. It does not appear from the evidence that the price charged plaintiff was any different than the price charged

other purchasers, at that time of the year, for Valencia oranges of like grade and quality. It is clear from the evidence that the sale to plaintiff was in intra-state commerce, and there is no evidence of inter-state sales to other purchasers at different prices. Also, there is no evidence that the price charged plaintiff had any effect whatever upon competition or tended to create a monopoly in any line of commerce. You are instructed, therefore, as a matter of law, that this sale of approximately 21 tons of oranges to plaintiff in April, 1951, was not a violation of Section 2(a) of the Robinson-Patman Act. [1512]

Defendants' Jury Instruction No. 28

The third cause of action also charges that defendant Exchange Orange violated Section 2(a) of the Robinson-Patman Act when it sold a carload of single-strength orange juice to plaintiff on or about September 28, 1951, at a price alleged to be higher than the price at which defendant was then selling single strength Valencia orange juice of like grade and quality to TreeSweet Products Company. The evidence shows that the sale to plaintiff on September 28, 1951, was a spot sale made to plaintiff in order to enable it to fill a particular order obtained by it from a California customer, while the sales to TreeSweet Products Company were continuing sales made under a long term contract. The evidence does not show whether the orange juice sold to plaintiff and the orange juice sold to

TreeSweet was of like grade and quality. The evidence indicates that neither the sale to plaintiff nor the sales to TreeSweet Products Company were in interstate commerce. The evidence also indicates that the difference in prices had no effect upon competition, if anything increased competition, and did not tend to create a monopoly in any line of commerce. You are instructed, therefore, as a matter of law, that the sale of orange juice to plaintiff in September, 1951, did not constitute a violation of Section 2(a) of the Robinson-Patman Act. [1513]

Defendants' Jury Instruction No. 29

The third cause of action also charges that defendant Sunkist, acting through its wholly-owned subsidiary defendant Exchange Orange Products Company, violated Section 2(a) of the Robinson-Patman Act in 1951 by discriminating in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit, particularly oranges, for the canning of single-strength orange juice and blended grapefruit and orange juice, the purchases involved in such discrimination being in interstate commerce, and the effect of such discrimination being substantially to lessen competition from the plaintiff and to tend to create a monopoly in the defendants. You are instructed, as a matter of law, that the evidence in this case does not show that either of the defendants Sunkist Growers, Inc., or Exchange Orange Products Company, sold by-product fruit, including oranges, to

different purchasers at discriminatory prices, as charged. Your verdict will therefore be for the defendants on this charge. [1514]

Defendants' Jury Instruction No. 30

The third cause of action also charges that defendant Sunkist or defendant Exchange Orange, or both of them, violated Section 2(a) of the Robinson-Patman Act in 1951 by discriminating indirectly in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit or juices processed therefrom, one or more of said purchases being in interstate commerce. The charge, under the evidence that has been introduced, is that the price schedule of defendant Sunkist showed Valencia oranges for sale in 1951 at $40 per ton, whereas defendant Exchange Orange entered into processing and sales contracts with TreeSweet Products Company and E. A. Silzle Corporation, but not with the plaintiff, whereby TreeSweet Products Company and E. A. Silzle Corporation processed Valencia oranges for defendant Exchange Orange and then purchased the juice itself from Exchange Orange at prices which in effect reflected a cost of the Valencia oranges of considerably less than $40 per ton. The evidence does not show that there was any discrimination in price between different purchasers, or that there was any discrimination in price between different purchasers of commodities of like grade and quality, or that any of the transactions were in

interstate commerce. Actually, the evidence shows affirmatively that all of the transactions complained of took place within the State of California. You are instructed, therefore, that your verdict must be for the defendants on this charge. [1515]

Defendants' Jury Instruction No. 31

The third cause of action also charges that defendants Sunkist or Exchange Orange, or both of them, violated Section 2(d) of the Robinson-Patman Act in 1951 by paying and contracting to pay things of value to its customers, TreeSweet Products Company and E. A. Silzle Corporation, in the course of interstate commerce, as compensation for services or facilities furnished by TreeSweet Products Company and E. A. Silzle Corporation in connection with the processing, handling and sale of products sold or offered for sale by defendants Sunkist or Exchange Orange, or both of them, to wit, canned fruit juice, particularly single-strength orange juice and blended orange juice, without making such payments or contracts to pay available to all other customers, including the plaintiff, on proportionally equal terms. Plaintiff's charge, under the evidence in this case, is that defendant Exchange Orange paid TreeSweet Products Company and E. A. Silzle Corporation a profit for processing the oranges under the TreeSweet and Silzle contracts, without making the same or proportionally equal profit payments available to plaintiff. As it does not appear from the evidence that

defendant Exchange Orange paid or contracted to pay either TreeSweet Products Company or E. A. Silzle Corporation any profit whatever for the processing of oranges under the TreeSweet or Silzle contracts, you are instructed that your verdict must be for the defendants on this charge. [1516]

Defendants' Jury Instruction No. 32

The third cause of action also charges that defendants Sunkist or Exchange Orange, or both of them, violated Section 2(d) of the Robinson-Patman Act in 1951 by paying and contracting to pay things of value to its customers, TreeSweet Products Company and E. A. Silzle Corporation, in the course of interstate commerce, as compensation for services or facilities furnished by TreeSweet Products Company and E. A. Silzle Corporation in connection with the processing, handling and sale of products sold or offered for sale by defendants, Sunkist or Exchange Orange, or both of them, to wit, canned fruit juice, particularly single-strength orange juice and blended orange juice, without making such payments or contracts to pay available to all other customers, including the plaintiff, on proportionally equal terms. It does not appear from the evidence in this case that defendants Sunkist or Exchange Orange paid or contracted to pay anything of value to its customers, TreeSweet Products Company or E. A. Silzle Corporation, in the course of interstate commerce, or withheld any similar payments to or contracts to pay plaintiff in the

course of interstate commerce, or that defendants Sunkist or Exchange Orange paid or contracted to pay anything of value to TreeSweet Products Company or E. A. Silzle Corporation, for processing products which had either been sold or were at the time being offered for sale by defendants Sunkist or Exchange Orange. And it affirmatively appears from the evidence that the plaintiff was not a customer of Sunkist or Exchange Orange. Under the evidence as it has been presented, I instruct you, as a matter of law, that your verdict on the charge of a violation of Section 2(d) of the Robinson-Patman Act must be for the defendants. [1517]

Defendants' Jury Instruction No. 33

The third cause of action charges that defendants Sunkist and Exchange Orange violated Section 3 of the Robinson-Patman Act in 1951 by being parties to and assisting in transactions of sale and contracts to sell with TreeSweet Products Company and E. A. Silzle Corporation, in interstate commerce, which discriminated to their knowledge against competitors of TreeSweet and Silzle, including the plaintiff, in that allowances were granted to TreeSweet and Silzle over and above any allowances then available to their competitors, including plaintiff, in respect of the sale of goods of like grade, quality and quantity, to wit, by-product fruit, particularly oranges. The evidence presented in this case does not show that any of the transactions of sale or contracts to sell complained of by plaintiff,

including the transactions of sale or contracts to sell entered into with TreeSweet or Silzle, were in interstate commerce. The evidence does not show that by-products fruit, including oranges was sold to TreeSweet or Silzle. The evidence does not show that by-products fruit, including oranges, was sold to competitors of TreeSweet or Silzle, including plaintiff, except for a sale of 21 tons of Valencia oranges to plaintiff in April, 1951, the terms of which were the same as the terms available to all buyers of Valencia oranges at the time. The record is barren of any evidence from which a comparison could be made of different sales of by-product fruit, including oranges, of like grade, quality and quantity. You are instructed, therefore, that your verdict must be for the defendants on the charge that either or both of them violated Section 3 of the Robinson-Patman Act. [1518]

Defendants' Jury Instruction No. 34

As the Court has already stated, your first problem is to find whether, under the Court's instructions, the defendants have violated the antitrust laws. If you find that the defendants have violated the antitrust laws, you will then have to consider to what extent the circumstances which befell the plaintiff are attributable to the wrongdoing, if any, of the defendants. Your verdict must be for the defendants, unless you find not only that defendants have violated the antitrust laws but that such violation was a substantial cause of any injury which may have occurred to the plaintiff's business. The mere fact that

plaintiff may have lost a substantial sum of money and had a business failure in 1951 does not prove that such loss or failure was caused by any illegal act on the part of the defendants. It may be that you will find that plaintiff's loss or failure in 1951 was due to plaintiff's inability to obtain by-product oranges from Morgan Ward who, according to the evidence, had been plaintiff's principal source of supply since 1948, or it may be that you will find that plaintiff's loss in 1951 was simply another in a series of losses sustained since it first entered business and was inevitable in view of the manner in which plaintiff conducted its business, or it may be that you will find that plaintiff's loss was caused by the quality of its products or its reputation in the trade, or it may be that you will find that plaintiff's loss was caused by its inability to keep its manufacturing and selling costs below its selling prices, or it may be that you will find that plaintiff's loss was caused by general economic conditions in the citrus industry in 1951. If you find that plaintiff's loss was caused by any of these things, or by any combination of them, then the acts of the defendants relied upon by the plaintiff in this case would [1519] not have been the cause or causes of plaintiff's loss or injury, and your verdict must be for the defendants. [1520]

Revision of Defendants' No. 34

As the court has already stated, your first problem is to find whether, under the court's instructions, the defendants have violated the antitrust

laws. If you find that the defendants have violated the antitrust laws, you will then have to consider whether or not one or more of the acts complained of by the plaintiff resulted in injury or damage to the plaintiff. You will next determine whether or not the violation of the antitrust laws, if such you find, and the commission of the act or acts complained of, if such you find, was a proximate cause of any injury which the plaintiff may have [1521] suffered.

Defendants' Jury Instruction No. 34a

If you find that neither of the defendants has violated the antitrust laws, it will be unnecessary for you to consider whether any acts of the defendants injured the plaintiff. If you find that the defendants, or either of them, have violated the antitrust laws, you will then have to consider whether or not any of the acts complained of as part of the conspiracy or conspiracies charged were the proximate cause of injury to the plaintiff. The fact that the plaintiff may have lost a substantial sum of money or suffered a business failure in 1951 does not prove that such loss or failure was caused by any illegal act of the defendants. Before you can return a verdict for the plaintiff, you must find not only that either or both of the defendants have violated the antitrust laws but that one or more of the specific acts complained of was the proximate cause of injury to the plaintiff. If you find that plaintiff's loss or business failure in 1951 resulted not from one or

more of the acts complained of but from some other cause or causes, then the acts of the defendants relied upon by the plaintiff in this case would not have been the proximate cause of an injury to the plaintiff, and your verdict should be for the defendants. [1522]

Defendants' Jury Instruction No. 35

The purpose of the Sherman Act is to prevent unreasonable restraints upon free competition in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which have come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader,
310 U.S. 469.

Northern California M.D. Ass'n v. Interment Ass'n., 120 F. Supp. 93, 95 (D. Calif., 1954). [1523]

Defendants' Jury Instruction No. 36

But even where one who has violated the antitrust laws has by his wrong prevented a precise computation of damages, the jury may not render a verdict based on speculation or guesswork. It may make a just and reasonable estimate of the damages based on relevant data and render its verdict accordingly.

Bigelow v. RKO Radio Pictures,
327 U.S. 251. [1524]

Defendants' Jury Instruction No. 36a

If you determine from a preponderance of the evidence, and under the instructions of the Court, that the defendants and the alleged coconspirators have violated the antitrust laws, and that such violation was the proximate cause of injury to the plaintiff, you will then have to consider the question of damages. Since any and all damage to plaintiff is claimed to have resulted from its alleged inability to acquire Valencia oranges or Valencia orange juice in 1951, you will have to determine at the outset the extent to which defendants Sunkist or Exchange Orange were under a duty to make Valencia oranges or Valencia orange juice available to plaintiff in that year, that is to say, you must determine before you can fix plaintiff's damage, what amount of Valencia oranges or Valencia orange juice defendants Sunkist or Exchange Orange were obligated to make available to plaintiff under all the circumstances which existed in 1951. You are instructed that you may not speculate or conjecture as to what this amount should have been but must base your decision upon some reasonable yardstick or yardsticks for determining what amount of Valencia oranges or Valencia orange juice defendants Sunkist or Exchange Orange should have made available or allocated to the plaintiff. If you are unable, without speculating or conjecturing, to determine or to come to some reasonable estimate of the amount of Valencia oranges or Valencia orange juice which defendants

Sunkist or Exchange Orange were obligated to furnish to plaintiff, as a particular independent processor of citrus fruit juices, you may not bring in a verdict for the plaintiff but your verdict must be for the defendants. [1525]

Defendants' Jury Instruction No. 37

You are instructed that you may not speculate as to the fact of damage, but if the fact of damage is proved, the amount may be reasonably approximated if the approximation is based on relevant evidence.

Bigelow v. RKO Radio Pictures,
150 F (2) 877 (rev'd on other grounds,
327 U.S. 251). [1526]

Defendants' Jury Instruction No. 38

You are instructed that loss of earnings to form a basis of damages for violation of the antitrust laws cannot depend upon speculation or conjecture.

Paterson Parchment Paper Co. v. Story Parchment Co., 37 F. (2) 537 (rev'd on other grounds, 281 U.S. 711). [1527]

Defendants' Jury Instruction No. 39

Upon the question of claimed loss of earnings, you may consider the evidence in respect of plaintiff's earnings since the time of its incorporation, and, if you determine that plaintiff operated at a

loss during the period from its incorporation until July 31, 1951, then you may not find that it suffered a loss of earnings thereafter as a result of the alleged wrongful conduct of the defendants, unless you find from the preponderance of the evidence that there was a change in conditions after July 31, 1951, which would justify an inference of reasonable expectation of earnings [1528] thereafter.

Defendants' Jury Instruction No. 40

You have been told that the plaintiff corporation is in reorganization under Chapter 11 of the Bankruptcy Act, and that Mr. Walker, whom you have seen in the courtroom, is the Trustee appointed by the Court to look after plaintiff's affairs during reorganization. You are instructed, however, that as against the defendants in this case, Mr. Walker's rights are no different from, or any greater than, the rights of the plaintiff corporation itself. For the purposes of this case, Mr. Walker simply stands in the shoes of the plaintiff. [1529]

Defendants' Jury Instruction No. 41

You are instructed that, if you reach and consider the question of damage, you may not take into consideration any claimed damage resulting from any refusal of defendant Exchange Orange to enter into an agreement or arrangement with plaintiff comparable to the Silzle contract. [1530]

Defendants' Jury Instruction No. 42
(Formerly Court Instruction M)

The Court will now attempt to advise you concerning the contentions and theories of the defendants in this case.

It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies would have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, Tree-

Sweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired [1531] with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business. [1532]

Defendants' Jury Instruction No. 43
(To Follow Plaintiff's 33)

You are instructed that the fact that Sunkist's growers produced 65% of the products Valencia oranges is not sufficient evidence, standing alone, to establish monopoly power over such [1533] oranges.

Defendants' Jury Instruction No. 44
(To Follow Plaintiff's No. 12)

The action of Exchange Orange in entering into the 1951 contracts with TreeSweet and Silzle and in refusing to enter into a comparable arrangement with the plaintiff must have been performed pursuant to the alleged combination or conspiracy to monopolize the market for citrus fruit juices processed in California and sold in interstate commerce, particularly single-strength Valencia orange juice. If you find that such action of Exchange Orange was the independent decision of Exchange Orange and was not engaged in pursuant to such conspiracy, your verdict should be for the [1534] defendants.

Defendants' 45

Interborough News Co. v. Curtis Publishing Co. 127 Fed. Supp. 286 (S.D. N.Y. 1954) Judge Sugarman.

Page 298:

"This exclusion of a single person from competition is not monopoly. The essence of monopoly is power to effect the exclusion of competition generally in a field for the benefit of a particular person or class."

Page 299:

"In the absence of either (a) the existence of monopoly power and intent to exercise it or (b) conduct intended to result in monopoly or monopoly power, there is no violation of § 2."

Receipt of Copy acknowledged.

[Endorsed]: Filed January 10, 1956. [1535]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE

Now come the defendants, jointly and severally, as the close of plaintiff's evidence, and move the Court to direct a verdict for defendants on each of

the causes of action attempted to be set forth in the amended complaint, and for grounds of said motion say:

First Cause of Action

1. The first cause of action does not state a claim upon which relief may be granted. [1540]

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract pleaded in the first cause of action, except the Tree-Sweet contract, is barred by the Statute of Limitations, since it was not pleaded in the original complaint.

4. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

5. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove the first cause of action attempted to be alleged in its amended complaint.

Second Cause of Action

1. The second cause of action does not state a claim upon which relief may be granted. [1541]

2. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

4. Plaintiff has failed to prove that defendants, or either of them, conspired to monopolize, attempted to monopolize, or monopolized interstate trade and commerce in citrus fruit juices processed

in California and sold in interstate commerce in violation of the antitrust laws.

5. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices, processed in California and sold in interstate commerce.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Any cause of action arising from any contract pleaded in the second cause of action, except the TreeSweet contract, is barred by the Statute of Limitations, since it was not pleaded in the original complaint.

11. Plaintiff has failed to prove the second cause of action attempted to be alleged in its amended complaint. [1542]

Third Cause of Action

1. The third cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for co-operatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, in the course of interstate commerce, discriminated in price between different purchasers of commodities of like grade and quality, or that any purchase included in the claimed discrimination was in interstate commerce, or that the effect of such claimed discrimination might be substantially to lessen competition or to tend to create a monopoly in any line of interstate commerce, or to injure, destroy, or prevent competition with the defendants, or either of them, or with anyone receiving the benefit of such claimed discrimination.

4. Plaintiff has failed to prove that defendants, or either of them, paid or contracted to pay anything to any customer, in the course of interstate commerce, as compensation for any services or facilities furnished by such customer in connection with any products manufactured, sold or offered for sale by defendants, or either of them, without payment or contract to pay being available on proportionally equal terms to all other customers competing in the distribution of such products.

5. Plaintiff has failed to prove that defendants, or either of them, in the course of interstate commerce, were parties to or assisted in any transaction

of sale, or contract to sell, which to their knowledge discriminated against competitors of the purchaser, in that any allowance was granted [1543] to the purchaser over and above any allowance then available to said competitors, in respect of a sale of goods of like grade, quality and quantity.

6. Plaintiff has failed to prove that defendants, or either of them, had any legal obligation to do business with the plaintiff.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove the third cause of action attempted to be alleged in its amended complaint.

11. The evidence has affirmatively established that the sale of the carload of canned citrus juice to plaintiff pleaded in paragraph VI of the third cause of action of the amended complaint took place prior to December 14, 1951, and that plaintiff resold and delivered said carload prior to said date. This transaction was not pleaded in the original complaint, and is, therefore, barred as a basis for a cause of action by the applicable statute of limitations.

Dated this 17th day of January, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 17, 1956. [1544]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
JANUARY 17, 1956

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiffs': Wm. C. Dixon for plf. and intervening plf.;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Thos. C. Strachan, Jr., Ross C. Fisher, and Melville C. Williams for deft's Sunkist Growers, Inc., and The Exchange Orange Products Co.

Proceedings:

For further jury trial. Jury is present. Court orders trial proceed.

Robert Hodge, witness for plaintiffs, heretofore sworn, resumes the stand and testifies further.

Plfs' Ex. 78 is admitted in evidence, and

Plfs' Ex. 69 is admitted in evidence.

Ronald Walker, witness for plaintiffs, hertofore sworn, is recalled and testifies further. Plaintiff rests.

At 11:30 a.m., Court orders the jury excused until 2:30 p.m., and the jury leaves the courtroom.

Court recesses to 1:30 p.m. At 1:30 p.m. court reconvenes herein. Counsel are present. The jury is absent.

Defendants file a written motion for directed verdict at close of plaintiffs' evidence, and Attorney Williams argues in support thereof.

At 2:40 p.m. the jury is brought into court and excused until 10 a.m., Jan. 18, 1956, and the jury leaves the courtroom.

Attorney Williams resumes his argument.

At 3:30 p.m. court recesses. At 3:50 p.m. court reconvenes herein.

Attorney Dixon argues in opposition to defendants' motion.

Attorney Williams argues further for defendants.

It Is Ordered that motion of defendants for a directed verdict is denied.

At 4:30 p.m., It Is Ordered that cause is continued to 10 a.m., Jan. 18, 1956, for further trial.

JOHN A. CHILDRESS,
Clerk.

By L. B. FIGG,
Deputy Clerk. [1548]

[Title of District Court and Cause.]

No. 13788-C

MOTION OF DEFENDANTS FOR LEAVE TO AMEND THEIR ANSWERS TO THE AMENDED COMPLAINT

Come now the defendants, jointly and severally, and ask leave to file the attached amendment to their answers, and for grounds of their motion show the Court as follows:

I.

On January 25 and 26, 1956, during the trial of the above action to their great surprise, which was promptly communicated to the Court, defendants were forbidden to show that plaintiff's alleged natural citrus fruit juice products were substantially adulterated by the addition of large amounts of water, citric acid and other ingredients, upon the

grounds that the quality of plaintiff's products is not in issue, that plaintiff had had no notice [1568] of such issue, and would itself be surprised and prejudiced were such issue to be injected into the case.

II.

Despite plaintiff's position as aforesaid, the quality of plaintiff's products is and has been an issue in this case from the beginning, as will appear from the ensuing paragraphs.

III.

The Amended Complaint alleges repeatedly that plaintiff was eliminated from competition as a canner of natural citrus fruit juices, especially single strength orange juice, and not as a canner of juices which must be labeled something other than natural citrus fruit juices and which could not be labeled single strength orange juice, because of the addition of water, citric acid and other ingredients. The allegations of the Amended Complaint were denied by the defendants.

IV.

Paragraph VIII (a) of the Amended Complaint alleges that plaintiff was a "first-class juice canner." This allegation was denied by the defendants.

V.

Paragraph VII of the Amended Complaint alleges that by reason of defendants' wrongful acts, plaintiff was eliminated as a competitor and in-

jured in his business, property, good will, and earnings. These allegations are denied by the defendants.

VI.

Paragraph VIII (e) of the Amended Complaint alleges that by reason of defendants' wrongful acts, plaintiff has irreparably lost [1569] patronage for its products. These allegations are denied by the defendants.

VII.

The foregoing and other controverted allegations of the Amended Complaint tendered issues as to the quality of plaintiff's product and whether the quality of plaintiff's product was the cause of plaintiff's injury and damage. That such matters are in issue is also clear from the discovery proceedings.

VIII.

On October 30, 1952, Judge Byrne ordered plaintiff to make available to defendants certain records, including plaintiff's laboratory records (Defts.' Exs. I(1), I(2), I(3) and I(4) for Identification), following an argument in which the then defendant Exchange Lemon Products Company urged that there were issues tendered by the pleadings as to whether plaintiff was a first-class juice canner and whether it was not the quality of plaintiffs' products rather than defendants' conduct which injured the business of the plaintiff (Par. 14 of Exchange Lemon Products' Motion for Production of Records; Exchange Lemon Products' Brief in Support

of said Motion, page 8; Tr. 85, September 8, 1952; Order of Judge Byrne, October 30, 1952).

IX.

Despite the order of Judge Byrne, plaintiff refused to produce the aforesaid laboratory records of plaintiff on the grounds that they were not material. Exchange Lemon Products Company then moved for an order under Rule 37 establishing that, for the purposes of this action, plaintiff's products must be taken to be of an inferior quality with respect to flavor, percentage of soluble solids, acid and sugar content. Following a hearing on this motion on [1570] March 30, 1953, plaintiff's counsel finally agreed to produce and did produce the aforesaid laboratory records of the plaintiff which have been offered in evidence by defendants.

X.

In addition to the foregoing, plaintiff's evidence itself has tendered the issue of the quality of plaintiff's products. The entire tenor of Mr. Winckler's testimony was to the effect that plaintiff produced a first-class product. Mr. Winckler testified not only that plaintiff's alleged canned citrus fruit juices met U. S. Grade A standards, but that in certain respects plaintiff held its products met even higher standards. He stated flatly that there was nothing in plaintiff's alleged canned citrus fruit juices but natural fruit juice, plus dry sugar where the juice was labeled as sweetened. (Tr. 1031 ff; Tr. 1041 ff; Tr. 1225 ff.)

XI.

Plaintiff is suing defendants for losses resulting from a claimed inability to sell canned natural citrus fruit juices, especially single-strength Valencia orange juice. Plaintiff is not entitled to damages for its inability to sell canned juices, especially orange juice, which, because of their adulteration, were not natural citrus fruit juices at all.

XII.

Plaintiff has long had notice, from the pleadings, from the discovery proceedings, and from the evidence adduced to date, that the quality of plaintiff's products was an issue in the case and that defendants expected to offer evidence to show that it was the quality of plaintiff's products which contributed to plaintiff's downfall. [1571]

XIII.

The evidence offered by defendants concerning the quality of plaintiff's products shows not only that it was the quality of the products that caused plaintiff's injury and damage, but that plaintiff, conducting its business almost continuously in violation of state and federal law and contrary to public policy, was defrauding the public and has come into court with unclean hands.

XIV.

Under the foregoing circumstances, defendants do not believe that they should be required to amend their answers. The issue of the quality of plaintiff's

products is raised by the pleadings and was tried throughout the proceedings by the consent of the parties until defendants proposed to show that such products were adulterated, mislabeled and misbranded. So far as "unclean hands" is concerned, this matter need not be pleaded at all but may be raised by any party at any time or by the Court on its own motion. In view of the position taken by counsel for the plaintiff and the ruling of the Court, however, and out of an abundance of caution, defendants ask leave to file the attached amendment to their answers conforming them more expressly to the issues which were tendered by the pleadings and by the evidence heretofore received during the trial.

XV.

Unless defendants are permitted to show that plaintiff's products were adulterated, mislabeled and misbranded in violation of applicable federal and state law and that such adulteration, mislabeling and misbranding contributed to plaintiff's claimed injury and damage, defendants will suffer material prejudice and a failure of justice will occur. [1572]

This motion is based upon the above and foregoing and upon the records and files herein and upon the affidavit of Ross C. Fisher hereto attached and upon the Memorandum of Points and Authorities hereto attached.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,

ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company. [1573]

Affidavit of Ross C. Fisher

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says that he is one of the attorneys for defendants in the above-entitled action; that he has knowledge of the facts and that the facts asserted in the foregoing motion are true and correct to the best of his knowledge and belief.

/s/ ROSS C. FISHER.

Subscribed and sworn to before me this 30th day of January, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for the County of Los Angeles, State of California. [1574]

[Title of District Court and Cause.]

No. 13788-C

AMENDMENT OF ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO AMENDED COMPLAINT

Comes now defendants Sunkist Growers, Inc., and The Exchange Orange Products Company and pursuant to leave of court file herein the following amendment to the answer of said defendants to plaintiff's amended complaint:

XXV.

Further Answer to Plaintiff's First, Second and Third Causes of Action

(Plaintiff's Fourth and Fifth Causes of Action having been heretofore [1575] dismissed.)

Plaintiff's alleged elimination as a competitor in the business of processing and selling citrus fruit juices, and any injury or damage claimed to have resulted therefrom, was caused not by any alleged wrongful conduct of the defendants, but by the facts, among other things, that during and prior to the year 1951, substantially all of the alleged citrus fruit juices processed and sold by plaintiff were adulterated by the addition of substantial amounts of water, citric acid and other ingredients and wer mislabeled and misbranded, that plaintiff was

aware of and had knowledge of such adulteration, mislabeling and misbranding, that palintiff sold such adulterated, mislabeled and misbranded citrus fruit juices in violation of federal and state law and contrary to public policy, and is in this court with unclean hands and is barred from any right to relief against these answering defendants or either of them.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products [1576] Company.

Memorandum of Points and Authorities in Support of Motion of Defendants for Leave to Amend Their Answer to the Amended Complaint.

Rule 15 (a) and (b) of Federal Rules of Civil Procedure.

Maltz v. Sax,
134 Fed. (2d) 2 (C.C.A. 7th, 1943).
Proper v. John Bene & Sons, Inc., et al.,
299 Fed. 863 (Dist. Ct. E. D. N. Y. 1924).

[Endorsed]: Filed January 31, 1956. [1577]

[Title of District Court and Cause.]

No. 13788-C

AMENDMENT OF ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO AMENDED COMPLAINT

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XXV.

Further Answer to Plaintiff's First, Second and Third Causes of Action

(Plaintiff's Fourth and Fifth Causes of Action having been heretofore dismissed.)

Plaintiff's alleged elimination as a competitor in the business of processing and selling citrus fruit juices, and any injury or damage claimed to have resulted therefrom, was caused not by any alleged wrongful conduct of the defendants, but by the facts, among other things, that during and prior to the year 1951, substantially all of the alleged citrus fruit juices processed and sold by plaintiff were adulterated by the addition of substantial amounts of water, citric acid and other ingredients and were mislabeled and misbranded, that plaintiff was aware of and had knowledge of such adulteration, mis-

labeling and misbranding, that plaintiff sold such adulterated, mislabeled and misbranded citrus fruit juices in violation of federal and state law and contrary to public policy, and is in this court with unclean hands and is barred from any right to relief against these answering defendants or either of them.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company.

[Endorsed]: Lodged January 31, 1956. [1580]

[Title of District Court and Cause.]

No. 13788-C

MOTION TO AMEND AMENDED COMPLAINT TO CONFORM TO THE EVIDENCE

Pursuant to the provisions of Rule 15 (b) plaintiff requests permission of the Court to amend the Amended Complaint to conform to the evidence as follows:

I.

At page 3, line 6, add the following: "Single-strength Valencia orange juice was the principal

source of income and profit of the plaintiff and constituted approximately 80% of the total citrus juice products processed and sold by the plaintiff during the years 1949 and 1950. The total sales of the plaintiff of all citrus juice products during said years exceeded $3,000,000. The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and co-conspirators [1582] Treesweet and Silzle."

II.

At page 6, line 2, after the word "California." add the following: "In 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus juice products. The product Valencia oranges which are not processed by defendant EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors. In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potential purchasers thereof, including TreeSweet and Silzle. The plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 selling price for such oranges. The Sunkist selling price for Valencia oranges in 1951 also established the selling price for such Valen-

cia oranges as were offered for sale to independent processors by other suppliers."

III.

At page 6, line 11, after the word "fruit" add the following: "particularly Valencia product oranges."

IV.

At page 6, line 12, aft the word "juice" add: "at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus juice products, particularly single strength Valencia juice."

V.

At page 6, line 25, after the word "Sunkist." add: "A total of approximately 5,400,000 gallons of single-strength Valencia juice was processed in California in 1951. Of this amount [1583] defendants EOP, TreeSweet, and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement hereinafter described in paragraph III, subdivisions (d) and (e) on pages 11 and 12 of the Amended Complaint herein. Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable

to and did not process any single strength Valencia juice in 1951."

VI.

At page 11, line 28, after (d) add the following: "Defendant EOP agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice. Pursuant to said agreement."

VII.

At page 12, line 1, before the word "also" add the words: "among other things."

VIII.

At page 12, line 2, after the word "TreeSweet" add: "at the Sunkist published selling price for 'Sunkist' single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff herein."

IX.

At page 12, line 17, after the word "market" add: "and at the 'Sunkist' published selling price for single-strength Valencia orange juice." [1584]

X.

At page 13, line 12, after the word "defendants," strike the balance of lines 12 to 17, inclusive, and add the following: "and the monopoly control of defendants Sunkist and EOP in 1951 over the amount and price of product Valencia oranges available for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet, and Silzle in the single-strength Valencia juice processed by them and sold in interstate commerce was eliminated; Sunkist determined, dominated, and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle in 1951; plaintiff was unable to process, can, and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, TreeSweet, and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement hereinbefore referred to in specification III (d) herein; plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952; was eliminated as a natural and future competitor of defendant Sunkist in the frozen concentrate citrus juice market; and has been dam-

aged in the manner and to the extent alleged in paragraphs VII and VIII herein."

XI.

At page 13, line 25, after the word "and" add the word "coconspirator." [1585]

XII.

At page 13, line 31, after the word "E.O.P." strike the following: "and E.L.P. have attempted to monopolize" and add the following: "and coconspirators E.L.P., TreeSweet and Silzle have conspired to and in fact have monopolized and."

XIII.

At page 14, line 4, after the word "commerce" add the words: "particularly single-strength Valencia orange juice."

XIV.

At page 14, lines 7 and 8, strike the words: "and said attempt to monopolize."

XV.

At page 14, line 10, after the word "juice," strike the words "defendants Sunkist and E.L.P." and add the following: "and in abuse of their monopoly power and control over the product Valencia oranges available for processing into citrus juice products, defendants Sunkist and E.O.P. entered into written agreements with independent processors, Hyland Stanford and General Foods, pursuant to which said companies secured their requirements

of Valencia oranges under arrangements which gave defendant E.O.P. 'first call' on the processing facilities of said companies to the exclusion of other marketing co-operative organizations, such as Independent Fruit Growers Association, and."

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and
Intervening Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff;

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1956. [1586]

[Title of District Court and Cause.]

No. 13,788—C

MINUTES OF THE COURT
JAN. 31, 1956

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff: Wm. C. Dixon for plf. and intervening plf.;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Thos. C. Strachan, Jr., Ross C. Fisher, and Melville C. Williams for def't. Sunkist Growers, Inc., and The Exchange Orange Products Co.

Proceedings:

For further trial. At 9:05 a.m. court convenes herein. The jury is absent, having been heretofore on Jan. 27, 1956, excused until Feb. 1, 1956.

Defts' Ex. FD, FE, and FF are marked for ident.

Plaintiffs file and present a motion to amend the amended complaint to conform to the evidence.

Defendants file and present a motion to amend their answers to the amended complaint.

Attorney Dixon argues in opposition to defendants' motion.

Attorney Strachan argues in support of motion.

It Is Ordered that motion of defendants to amend their answers to the amended complaint is denied.

Defts' Exs. ED, EE, EF, EG, EH, EI, EJ, EK, EM, EP, ES, FD, and DF are admitted in evidence.

At 10:50 a.m. court recesses. At 11:45 a.m. court reconvenes herein. Counsel are present. The jury is absent.

Attorney Fisher argues in opposition to plaintiffs' motion filed this morning to amend the complaint.

At 12:10 p.m. court recesses to 2 p.m.

At 2 p.m. court reconvenes herein. Counsel are present. The jury is absent.

Attorney Fisher argues further.

Attorney Dixon argues in support of plaintiffs' motion to amend.

It Is Ordered that motion of plaintiffs to amend the complaint to conform to evidence is granted, and that plaintiffs serve and file its amended complaint by Thursday morning, Feb. 2, 1956, and that defendants may have until Tuesday morning, Feb. 7, 1956, to serve and file their answer thereto.

Defendants move for postponement of the trial for one week, in view of the ruling allowing complaint to be amended. It is ordered that said motion is denied.

Plaintiffs move orally that the third cause of action of the amended complaint be dismissed, and it is ordered that the motion is granted.

Court and counsel confer relative to proposed jury instructions, and thereafter It Is Ordered that cause is continued to 10 a.m., Feb. 1, 1956, for further trial.

JOHN A. CHILDRESS,
Clerk;

By L. B. FIGG,
Deputy Clerk. [1588]

In the United States District Court, Southern District of California, Central Division

Case No. 13788—C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, EXCHANGE LEMON PRODUCTS COMPANY, a Corporation, and TREESWEET PRODUCTS COMPANY, a Corporation,

Defendants.

SECOND AMENDED COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTITRUST LAWS

The court having granted the motion of the plaintiff to amend its complaint to accord with the evidence, plaintiff Winckler & Smith Citrus Products Company, alleges, as follows:

General Allegations

I.

Jurisdiction. This amended complaint is filed and these proceedings are instituted under the following Acts of Congress and Statutes of the State of Cali-

fornia:

Section 1 of the Act of Congress of July 2, 1890, Section 2 of the Act of Congress of July 2, 1890, Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Antitrust Act, (15 USCA ss 1, 2), Section 4 of the Act of Congress of October 15, 1914, Section 16 of the Act of Congress of [1590] October 15, 1914, commonly known as the Clayton Antitrust Act (15 USCA ss 15, 26), Section 2 of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (15 USCA ss 13, 13(a) 1; Section 16,700 to 16,758 of the California Business and Professions Code, commonly known as the Cartwright Antitrust Law and Sections 17,000 to 17,101, inclusive of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facilities, and the conspiracies and combinations to discriminate in price, service and facilites, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court, and elsewhere in California and throughout the United States.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Company, is and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California. Plaintiff filed a Petition under Chapter 10 of the Bankruptcy Act, known as No. 53860-c in the files of this court, on March 19, 1952, and, on or about March 26, 1952, plaintiff filed a petition for reorganization under said Act and Ronald Walker, intervener herein, was appointed trustee of the assets of plaintiff by the court, in said proceedings.

(b) Plaintiff's Business. Prior to the bankruptcy proceedings referred to in Par. II(a) herein, plaintiff was a juice canner of by-product citrus fruit, i. e., oranges, lemons and grapefruit, buying the said by-product fruit in Arizona and California, processing and canning the fruit into natural and frozen concentrate juice, in Anaheim, California, and causing the canned juices to be transported and marketed in intrastate and interstate commerce throughout the United States. In 1950 and 1951 plaintiff furthermore caused canned citrus fruit juice to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States. Single-strength Valencia orange juice was the principal source of income and profit of the plaintiff and constituted approximately 80% of the total citrus juice products processed and sold by the plaintiff during

the years 1949 and 1950. The total sales of the plaintiff of all citrus juice products during said years exceeded $3,000,000. The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and coconspirators TreeSweet and Silzle.

III.

Defendants and coconspirators

(a) California Fruit Growers Exchange, (hereinafter referred to as Sunkist) is, and at all times herein mentioned was a California membership corporation with its principal place of business in the City of Los Angeles, California. The name of said defendant was changed to Sunkist Growers, Inc., on or about February 8, 1952. The members of Sunkist produce about 70% of all the oranges grown in the State of California. Sunkist is and at all times mentioned herein was in the business of marketing fresh citrus fruit throughout the United States. Through a subsidiary company, The Exchange Orange Products Company, one of the defendants herein, Sunkist is and at all times mentioned herein was in the business of canning fruit juices and marketing the said fruit juices in intrastate and interstate commerce throughout the United States.

(b) The Exchange Orange Products Company (hereinafter referred to as E.O.P.) is, and at all times herein mentioned was, a California corpora-

tion, with its principal place of business in the County of Los Angeles, California. It is and at all times herein mentioned was engaged in the business of processing and canning by-product fruit into natural and frozen concentrate citrus fruit juices. The fruit juices canned directly by E.O.P. are marketed for said defendant in intrastate and interstate commerce throughout the United States by defendant Sunkist.

(c) Exchange Lemon Products Company (referred to hereinafter as E.L.P.) is named a co-conspirator herein, and is and at all times herein mentioned was a California corporation [1591] with its principal place of business in the City of Corona, California. Substantially all the lemons produced in the United States are produced in California. The members of E. L. P. produce about 90% of all lemons produced in California. E. L. P. is, and during the year 1951 was among other things engaged in the business of producing lemons and canning natural and frozen concentrate citrus fruit juices. In December, 1950, E. L. P. acquired all the capital stock of Dameral-Allison Company, a California corporation and a processor of citrus fruit juices, and merged the assets of said company with E. L. P., thereafter selling the orange juice and frozen concentrate so acquired in competition with the plaintiff during the year 1951. Substantially all the citrus fruit juices canned by E. L. P. are marketed for it throughout the United States by defendant Sunkist.

(d) TreeSweet Products Company (hereinafter referred to as TreeSweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California, and is named as a co-conspirator herein. It is and at all times mentioned was a juice canner of by-product fruit, buying the said by-product fruit in Arizona and California, and causing the canned juices to be transported in intrastate and interstate commerce into the various states of the United States, including states in which plaintiff marketed its canned juices. Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) E. A. Silzle Corporation (hereinafter referred to as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Said corporation is engaged in the business of processing by-product citrus fruit into natural and frozen concentrate juice and marketing the same in the State of California and other states of the United States. It is named a co-conspirator but is not made a defendant herein.

IV.

Definitions:

"Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial [1592] purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for processing into single-strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satisfactory for or capable of being absorbed by the fresh citrus fruit market.

"Citrus fruit juice" refers to "natural" and "frozen concentrate" juice processed from "by-product fruit."

"Natural fruit juice" refers to "single-strength juice" and "hot pasteurized concentrate juice."

"Frozen concentrate juice" refers to concentrate citrus fruit juice processed under low temperature and quickly frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any cooperative or association such as Sunkist, marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry

(a) Substantially all of the citrus fruit marketed in the United States is produced in the states of California, Florida, Texas, and Arizona.

(b) Defendant Sunkist is the largest citrus fruit marketing organization in the United States, and through its subsidiary, E.O.P. is the largest single source of by-product oranges in the State of California. In 1951 Sunkist and E.O.P. controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus juice products. The product Valencia oranges which are not processed by defendant E.O.P. into citrus juice products or by independent processors for the account of E.O.P. are usually sold by Sunkist to independent processors. In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potential purchasers thereof, including TreeSweet and Silzle. The plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 selling price for such oranges. The Sunkist selling price for Valencia oranges in 1951 [1593] also established the selling price for such Valencia oranges as were offered for sale to independent processors by other suppliers. As marketing agent for defendant, E.L.P., Sunkist also is the largest marketing organization for lemons, other than by-product lemons, marketed as fresh fruit in interstate trade and commerce throughout the United States.

(c) Coconspirator E.L.P. is the primary and principal source of by-product lemons used by plaintiff and other independent juice canners in

producing canned natural and frozen concentrate lemon juice.

(d) Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit, particularly Valencia product oranges, for processing into canned natural or frozen concentrate juice at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus juice products, particularly single strength Valencia juice.

(e) During the year 1951 defendant Sunkist engaged in an extensive advertising program to promote the trade name "Sunkist" as applied to canned natural and frozen concentrate fruit juices marketed by it and for defendant E.L.P., in intrastate and interstate commerce.

(f) Substantially all the canned natural and frozen concentrate citrus fruit juices sold in the United States are canned in the states of California, Florida, Texas and Arizona. Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951, approximately 50% and 80% in the respective years, of canned natural and frozen concentrate orange juice produced in California and Arizona and thereafter marketed throughout the United States, was processed by or on behalf of defendant Sunkist. A total of approximately 5,400,000 gallons of single-strength Valencia

juice was processed in California in 1951. Of this amount defendants E.O.P., TreeSweet, and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement hereinafter described in paragraph III, subdivisions (d) and (e) on pages 11 and 12 of the Amended Complaint herein. Because of the monopoly [1594] control by Sunkist and E.O.P. over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single-strength Valencia juice in 1951.

(g) Plaintiff is informed and therefore alleges upon information and belief that in the years 1950 and 1951 more than 50% of the canned natural and frozen concentrate lemon juice produced in California and Arizona and marketed throughout the United States was processed by or on behalf of defendants Sunkist and E.L.P.

(h) Defendant E.O.P.'s sole source of supply of by-product fruit in 1951 was defendants Sunkist and E.L.P.

(i) Substantially all the by-product oranges processed by defendant E.L.P. into natural and frozen orange concentrate juice are secured from defendant E.O.P.

(j) Plaintiff is informed and therefore alleges upon information and belief that TreeSweet's prin-

cipal, if not exclusive source of supply of by-product fruit in 1951 was defendants E.O.P. and E.L.P.

VI.

Interstate Commerce

(a) The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant, continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and making of contracts; written and wired communications, the assemblage of personnel, property, and materiel in California, Arizona, and Texas, the transportation of fresh fruit from Arizon and Texas to California, the shipping of fresh fruit from California to all the states of the United States, the processing and canning of by-product fruit in California, Arizona, Florida, and Texas, and the shipping of the natural and frozen concentrate fruit juices produced therefrom, throughout the United States.

(b) Plaintiff, as part of the citrus industry during the year 1951, was [1595] engaged at its Anaheim, California, plant in the business of processing by-product fruit into natural and frozen concentrate juice and thereafter selling the same in intra and interstate commerce in competition with natural and concentrate juices processed and sold by defendants and co-conspirators TreeSweet and Silzle. Among

other things and in the course of purchasing by-product fruit from defendants E.O.P., E.L.P. and others, plaintiff caused fresh fruit produced in Arizona to be shipped to it by interstate carriers, from Arizona to California. In 1951, plaintiff also purchased some natural juice in the states of Florida and California from processors located in said states, for resale purposes to customers of plaintiff located in the various states of the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant, continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and material in at least fifty cities of the United States, the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiary, E.O.P., and co-conspirator E.L.P. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Co-conspirator E.L.P. is and during the year 1951, was engaged in interstate trade and commerce throughout the United States in transporting canned fruit juices from California to other states of the United States.

(e) Co-conspirator TreeSweet is and was during the year 1951, engaged in interstate trade and com-

merce throughout the United States in transporting and selling canned fruit juices from California to and in other states of the United States.

(f) Plaintiff, defendants Sunkist, E.O.P. and co-conspirators E.L.P., TreeSweet and Silzle processed or caused to be processed substantially all the canned natural and frozen concentrate orange and lemon juice produced in the State of California during the year 1951. A substantial part of said canned fruit juice was transported in interstate commerce. [1596]

VII.

Damages

Prior to 1951, plaintiff enjoyed an extensive and profitable business and had expended in excess of $500,000.00 in promoting and developing good will, reputation and distribution for its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff was eliminated as a competitive factor in the business of processing and selling citrus fruit juices in intrastate and interstate markets, and has been injured in its business and property, good will, promotions, advertising and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff.

VIII.

Threatened Loss and Damage

By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first-class juice canner has been seriously and irreparably impaired and injured, and to the unfair, wrongful and competitive advantage of defendants and others:

(b) Plaintiff was compelled to pay unreasonable and discriminatory prices for by-product fruit to the damage and loss of plaintiff and to the unfair, wrongful and competitive advantage of the defendants and others:

(c) Plaintiff has irreparably lost patronage for its products and otherwise continues to be threatened with loss and damage:

(d) Plaintiff is without any plain, speedy or adequate remedy at law, and unless the defendants and each of them are temporarily and permanently restrained and enjoined, pursuant to pertinent statutes and laws, from continuing their unlawful practices and activities as herein alleged, defendants will continue their wrongful acts and conduct and plaintiff will continue to suffer irreparable loss and damage. [1597]

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section I of the Sherman Act

All of the defendants, each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, have, for many years last past, in the course of interstate trade and commerce, combined and conspired with each other and have entered into contracts which have had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States with resultant injury and damage to the plaintiff.

III.

Specifications

For some time past, and particularly since in or about the year 1951, the exact date being unknown to plaintiff, the defendants, co-conspirators TreeSweet and Silzle combined and conspired and entered into contracts which have had the effect of tending to eliminate plaintiff and of eliminating plaintiff as a competitor in the canned natural and frozen concentrate juice market of the United States and particularly from the single strength orange juice market therein, so as to disable and prevent plaintiff from competing with the defendants in such market.

The defendants and co-conspirators TreeSweet and Silzle have done the things they conspired and

combined to do and among other things have entered into contracts, written and oral, which have had the force and effect of eliminating the competition of the plaintiff in such market. Specifically, among other things, said defendants did the following acts:

(a) E.L.P. by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural and frozen citrus fruit juice, at cost and without profit to E.L.P. During [1598] the canning season, 1950-1951, E.L.P. processed 28,812 tons of oranges for E.O.P. under said oral agreement.

(b) Defendant E.O.P., by oral agreement, agreed to process and did process in 1951, lemons made available to E.O.P. by E.L.P. for processing into canned, natural and frozen citrus fruit juice at cost and without profit to E.O.P., or defendant Sunkist. E.O.P. processed 1,740 tons of lemons for E.L.P. during the 1950-1951 season under said oral agreement.

(c) Defendants Sunkist and E.O.P. agreed to establish and maintain the price of by-product oranges available to independent processors of natural and frozen concentrate juice, such as plaintiff, at a price which would make it impossible for independent processors such as plaintiff, to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price, or under any other arrangement that would enable plaintiff and other

independent processors to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and Silzle.

(d) Defendant E.O.P. agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice. Pursuant to said agreement defendant E.O.P. and co-conspirator TreeSweet entered into a written custom packing agreement with an effective date of July 23, 1951, which provided among other things for the processing of by-product oranges into natural orange juice for the account of E.O.P. at cost and without profit to TreeSweet. Said contract, among other things, also provided for the purchase by TreeSweet from Sunkist of the "canned juice requirements" of TreeSweet, at the Sunkist published selling price for "Sunkist" single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff herein. The contract had the purpose and effect of enabling TreeSweet to process by-product oranges into natural orange juice [1599] without purchasing by-product oranges

from E.O.P. or any other supplier, and to secure its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with Sunkist or TreeSweet in the natural orange juice market. Defendant E.O.P. furnished by-product oranges to TreeSweet during the 1951 orange juice canning season, under said contract, which oranges TreeSweet processed at cost for defendant E.O.P., defendant Sunkist selling and TreeSweet acquiring its requirements of natural orange juice from E.O.P., thereunder, during the latter part of 1951 and the early part of 1952. Substantially all the single natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market, and at the "Sunkist" published selling price for single-strength Valencia orange juice.

(e) Defendant E.O.P. and co-conspirator Silzle entered into a written contract executed September 10, 1951, but effective as of June 26, 1951, wherein, among other things, defendant E.O.P. agreed to make by-product oranges available to Silzle for processing into canned orange juice under the Silzle label at a cost of $22.50 a ton or substantially below the price at which defendant E.O.P. was then selling or willing to sell by-product oranges of the same quality for processing purposes to plaintiff and other independent processors. Defendant E.O.P. furnished by-product oranges to Silzle and Silzle

acquired by-product oranges from defendant E.O.P. during the 1951 canning season under said contract and produced 85,080 cases of canned natural orange juice thereunder, which juice was processed, acquired and sold by Silzle in competition with juice processed and sold by plaintiff in the canned natural orange juice market. Said contract had the purpose and effect of enabling Silzle to acquire by-product oranges at a price substantially below the price then charged other independent processors, such as plaintiff by E.O.P. for by-product oranges and enabled Silzle to acquire its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with co-conspirators TreeSweet and Silzle and defendants Sunkist, E.O.P., in the natural orange juice market.

(f) Defendant E.O.P. refused to enter into a custom packing agreement [1600] with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with co-conspirators TreeSweet and Silzle.

As a direct and approximate result of each of the above acts of the defendants, and the monopoly control of defendants Sunkist and E.O.P. in 1951 over the amount and price of product Valencia oranges available for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet and Silzle in the single-strength Valencia juice processed by them and sold in interstate commerce was elimi-

nated; Sunkist determined, dominated and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle in 1951; plaintiff was unable to process, can and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, TreeSweet and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement hereinbefore referred to in specification III (d) herein; plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952; was eliminated as a natural and future competitor of defendant Sunkist in the frozen concentrate juice market; and has been damaged in the manner and to the extent alleged in paragraphs VII and VIII herein.

Second Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section 2 of the Sherman Act

Defendants Sunkist, E.O.P. and co-conspirator E.L.P., have a monopoly control over the production and distribution of fresh citrus fruit [1601] available in California and Arizona for processing into canned natural and frozen concentrate citrus fruit juice in the State of California. By entering into the oral and written agreements and in doing the acts described in Paragraph III (a) to (f) inclusive herein, defendants Sunkist, E.O.P. and co-conspirators E.L.P., TreeSweet and Silzle have conspired to and in fact have monopolized that part of the interstate trade and commerce in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California and thereafter transported and sold in intra and interstate commerce, particularly single-strength Valencia orange juice, with the resultant damages and injury to the plaintiff as alleged in Paragraphs VII and VIII herein.

Pursuant to a conspiracy to monopolize the aforesaid part of the trade and commerce of the United States in canned natural and frozen concentrate citrus fruit juice, and in abuse of their monopoly power and control over the product Valencia oranges available for processing into citrus juice products, defendants Sunkist and E.O.P. entered into written agreements with independent processors, Hyland Stanford and Mission Dry, pursuant

to which said companies secured their requirements of Valencia oranges under arrangements which gave defendant E.O.P. "first call" on the processing facilities of said companies to the exclusion of other marketing co-operative organizations such as Independent Fruit Growers Association, and entered into the oral agreements and contracts and did the acts referred to in Paragraph III (a) to (f) inclusive herein and delivered and sold by-product oranges, in the course of such commerce, to the parties to said contracts, which were thereafter processed into natural orange juice which was purchased by TreeSweet and Silzle from E.O.P., for resale purposes at prices which prevented plaintiff from processing and selling natural orange juice at prices competitive to those at which defendants Sunkist and co-conspirators TreeSweet and Silzle sold natural orange juice in the intrastate and interstate market for such juice, with the resultant injury and damage to the plaintiff as alleged in Paragraphs VII and VIII, herein. [1602]

Wherefore, plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this Complaint.

2. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants, Sunkist and E.O.P.

and each of them, to offer and sell by-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors, including the defendants, The Exchange Orange Products Company, Exchange Lemon Products Company and co-conspirators TreeSweet and Silzle, and to offer custom packing agreements to plaintiff when defendants E.O.P. and Sunkist offer comparable agreements to co-conspirators TreeSweet and Silzle.

3. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the monopolization of the same hereinabove described, be declared illegal and violative of the anti-trust laws of the United States and the State of California.

4. That plaintiff have judgment in the sum of $2,400,000.00, the same being threefold damages under the Federal Laws which it sustained for the violations alleged in the First and Second Causes of Action.

5. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

6. For all other proper relief.

Dated: February 2, 1956.

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and
Intervening Trustee;

/s/ HARRY M. IRWIN,
Attorney for Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 2, 1956. [1603]

[Title of District Court and Cause.]

No. 13788—C

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO PLAINTIFF'S AND TRUSTEE AND INTERVENER'S SECOND AMENDED COMPLAINT

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant The Exchange Orange Products Company, a corporation, and for answer to plaintiff's and trustee and intervener's Second Amended Complaint filed herein on February 2, 1956, admit, deny and allege as follows:

(For the convenience of the Court, the subheadings used in this answer correspond to those used in the Second Amended Complaint.) [1610]

ANSWER TO GENERAL ALLEGATIONS OF SECOND AMENDED COMPLAINT

I.

Jurisdiction. Admit that plaintiff's Second Amended Complaint purports to be filed and the proceedings purport to be instituted under the acts of Congress and Statutes of the State of California set forth in paragraph I of plaintiff's General Allegations. Deny that any of the Statutes or Acts mentioned on page 2, lines 2 to 7, inclusive of plaintiff's Second Amended Complaint, being the Robinson-Patman Act, the California Cartwright Act or the California Unfair Trade Practices Act, have any application to plaintiff's alleged action, plaintiff having heretofore dismissed the Third, Fourth and Fifth causes of action of its former complaints filed herein.

Deny the allegations of the last subparagraph of paragraph I of plaintiff's General Allegations, and particularly deny that defendants here answering or either of them at any time alleged in plaintiff's Second Amended Complaint, or at all, committed any unlawful act or violation as described in plaintiff's Second Amended Complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities, or

any conspiracy, or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's Second Amended Complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States or at all.

II.

(a) Plaintiff. Admit the allegations of subparagraph (a) of [1611] paragraph II of plaintiff's General Allegations.

(b) Plaintiff's Business. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of paragraph II of plaintiff's General Allegations, except, that defendants admit that prior to the bankruptcy proceedings referred to in subparagraph (b) of paragraph II of plaintiff's General Allegations, plaintiff was a juice canner of citrus fruit, processing and canning the fruit into natural and frozen concentrate juice in Anaheim, California, and that plaintiff bought citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951 plaintiff caused citrus fruit juice to be custom packed for it in the State of Florida. Defendants here answering admit that a product alleged by plaintiff to be single-strength

Valencia juice was the principal source of income of the plaintiff during the years 1949 and 1950; deny that said product was a source of profit to plaintiff during either of said years; admit that said product constituted approximately 80% of the total citrus juice products processed and sold by plaintiff during said years. Admit that the total sales of the plaintiff of all citrus juice products exceeded $3,000,000 in the said two years where taken as a whole. Admit that portion of the alleged single-strength Valencia orange juice processed by plaintiff during the years 1949 and 1950 was sold in interstate commerce. Defendants are without knowledge as to whether said alleged single-strength orange juice was sold in competition with single-strength Valencia juice processed and sold by these answering defendants or either of them or by the alleged coconspirators Tree-Sweet and Silzle or either of them.

III.

(a) Defendants. For answer to subparagraph (a) of paragraph III of plaintiff's General Allegations, admit that defendant Sunkist [1612] Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's Second Amended Complaint was a California membership corporation, with its principal place of business in the City of Los Angeles, California, and admit that its name was changed to Sunkist Growers, Inc., on or about February 8, 1952, and admit that its member-growers produce about

70% of the oranges grown in the State of California, and allege in that regard that at all of said times said defendant was and is a corporation duly existing under and by virtue of the laws of the State of California, to wit, a nonprofit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of nonmembers to an amount greater in value than such as are handled by it for its members. Admit that it is now and at all times mentioned in plaintiff's Second Amended Complaint was in the business of marketing fresh citrus fruit of its members throughout the United States and elsewhere. Admit that a subsidiary company of Sunkist, The Exchange Orange Products Company, one of the defendants here answering, is and at all times mentioned in plaintiff's Second Amended Complaint was in the business of canning orange and grapefruit juices, but allege that such juices so canned by defendant The Exchange Orange Products Company were and are marketed by it through Sunkist. Admit that said juices so canned were and are marketed in intrastate and interstate commerce throughout the United States.

(b) For answer to subparagraph (b) of paragraph III of plaintiff's General Allegations, admit

that defendant The Exchange Orange Products Company (being referred to in plaintiff's [1615] Second Amended Complaint and sometimes herein as EOP) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the County of Los Angeles, State of California. Admit that said defendant is and at all times mentioned in plaintiff's Second Amended Complaint was engaged in the business of processing and canning oranges and grapefruit into, among other products, natural and frozen concentrate fruit juices. Admit that the said fruit juices canned by defendant EOP are marketed by it through Sunkist, and allege in that regard that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in products of nonmembers of Sunkist in amounts greater in value than such as are handled by it for the members of Sunkist. Admit that the said fruit juices canned by EOP and marketed by it through Sunkist are marketed in interstate and intrastate commerce throughout the United States. Deny each, every and all of the allegations of said subparagraph (b) of paragraph III of plaintiff's General Allegations except those specifically herein admitted.

(c) For answer to subparagraph (c) of paragraph III of plaintiff's General Allegations, defend-

ants here answering admit that Exchange Lemon Products Company (being referred to in plaintiff's Second Amended Complaint and sometimes herein as ELP) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the City of Corona, California. Admit that ELP is and during the year 1951 was among other things engaged in the business of producing natural and frozen concentrate lemon juice. Deny that it is, and was during said times engaged in the business of producing lemons, and deny that it is and was during said time engaged in the business [1614] of canning natural or frozen orange juice or grapefruit juice. Admit that on or about December, 1950, ELP acquired all of the capital stock of Damerel-Allison Company, a California corporation, which was at the time a processor of citrus fruit juices, and that it merged the assets of said company with ELP. Admit that substantially all of the lemon juices canned by ELP are marketed by it throughout the United States through defendant Sunkist. Allege that ELP at all times mentioned in plaintiff's Second Amended Complaint has been and now is a corporation organized under the laws of the State of California, and operated in compliance with the requirements of Section 1190 et seq. of the California Agricultural Code. Allege that it was organized by growers of lemons, for collectively processing, preparing for market, handling and marketing in interstate and foreign commerce lemons and lemon products, and that it is and at all times mentioned in plaintiff's

Second Amended Complaint was operated for the mutual benefit of its members as producers of lemons and that it does not pay dividends and does not deal in the products of nonmembers in amounts greater in value than such as are handled by it for its members. Deny for lack of information or belief each, every and all of the allegations of said subparagraph (c) of paragraph III of plaintiff's General Allegations except those specifically herein admitted. Allege that on or about December 13, 1955, ELP was dismissed as a party defendant in this action.

(d) For answer to subparagraph (d) of paragraph III of plaintiff's General Allegations, admit that TreeSweet Products Co. (being referred to in plaintiff's Second Amended Complaint as TreeSweet Products Company, and being referred to in plaintiff's Second Amended Complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was among other things a [1615] juice canner of citrus fruit; admit that at times during the times mentioned in plaintiff's Second Amended Complaint it bought in California a portion of said citrus fruit canned by it. Admit that it did and does cause a portion of the canned juices to be transported in intrastate and interstate commerce. Admit that said defendant operates and for some time has operated a plant in the State of Florida, and does and has

transported and marketed some canned citrus juices from that State in interstate commerce. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of subparagraph (d) other than the allegations specifically admitted above. Allege that prior to the service and filing of plaintiff's Second Amended Complaint TreeSweet was dismissed as a party defendant in this action.

(e) For answer to subparagraph (e) of paragraph III of plaintiff's General Allegations, admit that E. A. Silzle Corporation (being referred to in plaintiff's Second Amended Complaint and in this answer as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Admit that said corporation is engaged in the business of processing citrus fruit into juice and marketing the same. Deny that Silzle is or was at any time mentioned in plaintiff's Second Amended Complaint or at any other time or times, a coconspirator of these answering defendants or either of them, or of any defendant herein, and deny that these answering defendants or either of them, or any other defendant herein, at any time or times mentioned in plaintiff's Second Amended Complaint or at all, ever conspired to or with Silzle in any manner, shape or fashion whatsoever.

Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said para-

graph (e) other than the allegations [1616] specifically mentioned herein.

IV.

Definitions. Defendants here answering assume that the definitions used in paragraph IV of plaintiff's General Allegations are to be restricted to the purposes of plaintiff's Second Amended Complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

The Citrus Fruit Industry

(a) For answer to subparagraph (a) of paragraph V of plaintiff's General Allegations, defendants here answering admit that substantially all of the citrus fruit marketed in the United States is produced in the States of California, Florida, Texas and Arizona.

(b) For answer to subparagraph (b) of paragraph V of plaintiff's General Allegations, the defendants here answering deny each, every and all of the allegations of said subparagraph, except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing

organization in the United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in processing (including in the term "processing" the processing of canned single-strength orange juice), and allege that EOP processes less than 2% of the canned single-strength orange juice produced in the United States, and allege that there is substantial competition from other marketing organizations; and further allege in that regard that approximately 90% of the canned single-strength [1617] orange juice which is processed in the United States is processed in the State of Florida. Deny that in 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus products and allege in that regard that the grower members of Sunkist controlled and accounted therefor. Deny that the product Valencia oranges which are not processed by EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors and allege in that regard that EOP processes or has processed for its account by independent processors only such product Valencia oranges as are not sold by Sunkist. Admit that in 1951 Sunkist determined the selling price for its product oranges after consulting independent processors, among others, who were customers of Sunkist, including TreeSweet and Silzle. Admit that plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 sell-

ing price for such oranges and allege in that regard that plaintiff was not a customer or potential customer of Sunkist at the time. Deny that the Sunkist selling price for Valencia oranges in 1951 established the selling price for such Valencia oranges as were offered for sale to independent processors by other suppliers.

(c) For answer to subparagraph (c) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (c).

(d) For answer to subparagraph (d) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of the allegations contained in said subparagraph (d).

(e) For answer to subparagraph (e) of paragraph V of plaintiff's General Allegations, defendants here answering deny [1618] said allegations, and in that connection allege that in 1951 defendants ELP and EOP advertised the products packed by each of them under the trade-mark Sunkist.

(f) For answer to subparagraph (f) of paragraph V of plaintiff's General Allegations, deny the allegations contained in the first sentence of said subparagraph (f). Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said subparagraph (f). Deny the balance of the allegations of said subparagraph (f) except that defendants admit that a total

of approximately 5,400,000 gallons of single-strength Valencia juice was processed in California in 1951.

(g) For answer to subparagraph (g) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph.

(h) For answer to subparagraph (h) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of said allegations.

(i) For answer to subparagraph (i) of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (i).

(j) For answer to subparagraph (j) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (j). [1619]

VI.

Interstate Commerce

(a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry as a whole includes the matters set forth in said subparagraph and allege in that regard that the State of Florida is a very important factor in the citrus fruit indus-

try, particularly in the canned single-strength orange juice field, canning approximately 90% of all single-strength orange juice canned in the United States, and in the frozen orange concentrate field, canning approximately 75% of all frozen orange concentrate canned in the United States.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations, defendants here answering are without knowledge as to the allegations contained in said subparagraph, except that defendants here answering admit that plaintiff's plant was located in the City of Anaheim, California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations, defendants here answering admit said allegations except the allegations regarding the transportation of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiary EOP and to ELP, and the allegation that at defendant Sunkist's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States, and allege in that regard that the only transportation of fresh fruit (i.e., fruit intended for fresh fruit channels) from Arizona to the plants of Sunkist and its subsidiary EOP and to ELP is a small amount of fruit to defendant Sunkist's citrus distributing plants, and allege that at defendants' instance fresh fruit (i.e., fruit intended for fresh fruit channels) is transported by interstate carriers from California and Arizona between the said [1620]

states and throughout the United States, and deny that at said defendants' instance canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) For answer to subparagraph (d) of paragraph VI of plaintiff's General Allegations, defendants here answering deny said allegations, except that they admit that during the year 1951 said ELP transported some canned lemon juice by interstate carriers from California to certain other states of the United States.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (e).

(f) For answer to subparagraph (f) of paragraph VI of plaintiff's General Allegations, defendants here answering deny the allegations contained in the first sentence of said subparagraph (f), and defendants here answering are without knowledge of the allegations contained in the second sentence of said subparagraph (f), except that defendants here answering admit that a part of the canned orange and grapefruit juices processed by EOP during the year 1951 and marketed by it through Sunkist was transported in interstate commerce.

VII.

Damages

Deny each, every and all of the allegations of paragraph VII of plaintiff's General Allegations.

VIII.

Threatened Loss and Damage

Deny each, every and all of the allegations of paragraph VIII of plaintiff's General [1621] Allegations.

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's First Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications

For answer to paragraph III of plaintiff's First Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit that effective as of July 23, 1951, it entered into an agreement with TreeSweet on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of

Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and that effective as of June 26, 1951, defendant EOP entered into a written agreement with Silzle on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and admit that fruit was supplied to each of said processors under said respective agreements, and except that by oral agreement with defendant EOP, ELP processed for EOP in 1951 at cost and without profit to ELP approximately 28,800 tons of [1622] Valencia oranges (some of said oranges were processed into canned single-strength juice and some were processed into canned frozen concentrate), and except that by oral agreement between ELP and EOP, EOP in 1951 custom packed for ELP, at cost and without profit to EOP, about 1,740 tons of lemons (some of said lemons were processed into canned single-strength lemon juice and some were processed into frozen concentrate lemon juice).

Answer to Plaintiff's Second Cause of Action

XII.

For answer to paragraph I of plaintiff's Second Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph

of defendants' answers to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's Second Cause of Action.

First Affirmative Defense

For a Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege plaintiff's second amended complaint and the General Allegations and the First and Second Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering or either of them.

Second Affirmative Defense

For a Second Separate, Distinct and Affirmative Defense to [1623] Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the applicable statute of limitations, namely, by the provisions of Section 338(1) of the Code of Civil Procedure of the State of California.

Third Affirmative Defense

For a Third Separate, Distinct and Affirmative Defenset to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving the E. A. Silzle Corporation are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contract with Silzle, referred to in plaintiff's Second Amended Complaint was disclosed in the answer of defendants here answering to Interrogatory No. 14 of the interrogatories of plaintiff dated March 14, 1952, which answer was filed herein May 26, 1952. Despite this plaintiff did not amend its complaint to include the Silzle contract until on or about December 15, 1954, when plaintiff served and filed its amended complaint, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or other matters alleged in plaintiffs' Second Amended Complaint involving alleged coconspirator Silzle. [1624]

Fourth Affirmative Defense

For a Fourth Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of the said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving either Hyland-Stanford or Mission Dry are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contracts with Hyland-Stanford and Mission Dry referred to in plaintiff's Second Amended Complaint were disclosed to plaintiff on or about November 9, 1955. Despite this plaintiff did not amend its complaint to refer to the contract with Hyland-Stanford until January 31, 1956, during the course of trial, and did not amend its complaint to refer to the contract with Mission Dry until February 4, 1956, after the evidence was all in at the trial and defendants had rested and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving Hyland-Stanford and Mission Dry.

Fifth Affirmative Defense

For a Fifth, Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of the said alleged causes of action are barred by the laches of [1625] plaintiff and trustee and intervener in this, that without admitting the truth of the allegations or matters contained in the last paragraph of subparagraph (f) of paragraph III of plaintiff's First Cause of Action any reliance placed by plaintiff and trustee and intervener upon any such allegations or matters is barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such allegations or matters. Plaintiff and trustee and intervener through discovery proceedings in this case and otherwise had knowledge long prior to the trial of this action of the alleged matters upon which they based such allegations and matters despite which plaintiff did not amend its complaint to set forth such allegations and matters until January 31, 1956, during the course of trial and near the end thereof to defendants' great surprise and prejudice, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any such allegations or matters.

Wherefore, defendants here answering pray that plaintiff take nothing by plaintiff's action; that de-

fendants here answering have judgment for their costs incurred herein against Plaintiff and intervener, and for such other relief as to the Court may seem meet and pr in the circumstances.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Receipt of copy acknowledge.

[Endorsed]: Filed February 7, 1956. [1626]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled cause, find in favor of the Plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee, and against the Defendants, Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Co., a corporation, and assess the damages in the sum of five hundred thousand and no/100 dollars ($500,000).

Dated: Los Angeles, Calif., February 10, 1956.

/s/ JOSEPH C. BERGER,
Foreman of the Jury.

[Endorsed]: Filed February 10, 1956. [1637]

[Title of District Court and Cause.]

No. 13788—C

APPLICATION FOR ALLOWANCE OF ATTORNEY'S FEES

Pursuant to the provisions of Section 4 of the Clayton Act and of the order of this Court, plaintiff submits herewith its application for attorneys' fees in the above-entitled action in the amount of $350,000, with supporting affidavits attached hereto.

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and Intervening Trustee.

/s/ BERNARD REICH,
Attorney for Plaintiff.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1638]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM C. DIXON IN SUPPORT OF APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES

State of California,
County of Los Angeles—ss.

William C. Dixon, being first duly sworn, says:

That he is one of the attorneys representing the plaintiff and intervening trustee in the above-entitled action, and that as such attorney he prepared and was in charge of the trial thereof; that this affidavit is made in support of the Application of the plaintiff for attorneys' fees to be added to the verdict of the jury and to be added to and made a part of the judgment to be entered by the Court in the above-entitled action on the said verdict.

Affiant says that he is a member of the bars of California, Ohio, and the United States Supreme Court, and he is a former member of the Supreme Court of the State of Ohio, and a [1639] practicing attorney since 1928. Affiant further says that he was United States, assigned to the Antitrust Division of the Department of Justice for a period of approximately ten (10) years commencing in April, 1944, and ending April, 1954, at which time he resigned from the Department of Justice to enter private practice in the City of Los Angeles, California. Affiant further says that during this said period of service with the Department of Justice of the Gov-

ernment of the United States affiant acted as Assistant Chief of the Trial Section of the Antitrust Division of said Department of Justice and served as Chief of the West Coast offices of the Antitrust Division of the Department of Justice with headquarters at Los Angeles, California, during said period of service. Affiant further says that while a Special Assistant to the United States Attorney General he was Chief Trial Counsel for the Government in many litigated and important antitrust cases, including U. S. v. National Lead Company, 63 F. Supp. 513, 332 U. S. 319; U. S. v. Standard Oil Company of California, et al., 78 F. Supp. 850, 337 U. S. 293; U. S. v. Richfield Oil Corporation, 99 F. Supp. 280, 343 U. S. 922; U. S. v. Nat'l City Lines, Inc., et al., 186 F. (2d) 562 (cert. den. 341 U. S. 916); Local 36 v. U. S., 177 F. (2d) 320 (cert. den.); CO^2 Fire Equipment Company v. U. S., 197 F. (2d) 489 (cert. den.), and participated in the preparation and trial of many other antitrust cases.

Affiant further says that he entered the instant case for the purpose of preparing and trying the same during the month of September, 1954, and that substantially all of his time since said date has been spent in the preparation and trial of said case; that affiant spent approximately in excess of 2,500 hours of work as an attorney in the course of preparing and trying said case; that the actual trial of said case was approximately 40 trial days, which period of time does not include the time of affiant in court in connection with pretrial and other matters di-

rectly related to the [1640] preparation of said case for trial, all of which appears as a matter of record in the files of the instant case.

Affiant further says that the problems encountered in the preparation and trial of said case were unusual and involved many new questions of law on which no direct decisions were applicable; that affiant was without any funds with which to secure proper and investigative assistance in preparing said case for trial; that the only legal assistance available to affiant during the aforesaid period was the assistance of Harry M. Irwin, a member of the bar of California and attorney for the Intervening Trustee in the instant case; that it was accordingly necessary for affiant to personally do much of the investigative and preparatory work aided and assisted by Mr. Irwin and the Trustee, Ronald Walker, in preparing said case for trial; that the defendants in said case were represented by three different law firms, two of which are located in Los Angeles and Corona; the third of which was a leading law firm, Pope & Ballard of the City of Chicago, Illinois, which was represented during the pretrial and trial proceedings by four members from said firm; that in addition thereto complex and involved accounting problems were presented and dealt with during the preparation and trial of said case; that two accountants appeared for the defendants during the trial of the case to give expert opinion testimony; that in their said testimony said accountants admitted the payment of the sum of $39,000 for accounting serv-

ices rendered to the defendants by said accountants in connection with the preparation of said case prior to the commencement of the trial and for services rendered up to December 1, 1955; that the firm of Pope & Ballard representing the defendants in said action were retained by the defendants for their defense because of their knowledge, reputation, and experience in defending private treble damage anti-trust suits; that affiant has reason to believe and therefore avers that the defendants have paid attorneys' fees to counsel representing said [1641] defendants in said case in an amount equivalent to or in excess of the amount requested by affiant herein on behalf of the plaintiff pursuant to the provisions of Section 4 of the Clayton Act before mentioned; that a reasonable charge for attorneys' fees for services rendered the plaintiff in connection with the preparation and prosecution of the within action is accordingly the sum of $350,000.

/s/ WILLIAM C. DIXON.

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ WILLIAM J. TIERNAN,
Notary Public in and for the County of Los Angeles, State of California. [1642]

[Title of District Court and Cause.]

Case No. 13788—C

AFFIDAVIT OF BERNARD REICH IN SUPPORT OF APPLICATION FOR COUNSEL FEES

State of California,
County of Los Angeles—ss.

Bernard Reich, being duly sworn, deposes and says:

1. Deponent makes this affidavit in support of the general application for fees; but to avoid confusion and so as not to detract from his associates, he limits this affidavit to his own legal services rendered.

2. Deponent was sole attorney for plaintiff for some [1643] three and one-half years, from the filing of the Complaint on February 1, 1952, to October 21, 1955. Thereafter he became junior to Chief Counsel William C. Dixon.

3. On or about June 17, 1952, deponent, in collaboration with Honorable Harry M. Irwin, became attorney for the Trustee, specially employed to prosecute the above-entitled action. Deponent remained such until his employment ceased on October 11, 1954.

4. Prior to retaining deponent, plaintiff had obtained what it deemed to be an unsatisfactory legal opinion with regard to the proposed litigation. On the other hand, deponent at the outset, and notwithstanding difficulties in connection with a number of

the issues, expressed and continued to express great faith in the lawsuit. When plaintiff corporation went into reorganization, deponent filed a waiver of his retaining fee and consistently maintained that the principal asset of the estate was the lawsuit.

5. In order to serve plaintiff and intervener at top efficiency, deponent learned the citrus fruit business, and to that end deponent held approximately fifty conferences, mostly with plaintiff's president, Nicholas J. Winckler, and some with the Trustee, Honorable Ronald Walker, and attorney for the Trustee, Honorable Harry M. Irwin. Deponent studied the plant at Anaheim on three different occasions and examined into thousands upon thousands of documents and records.

6. Deponent has practiced law since 1937, except for eighteen months in the Armed Services, and for more than half of the years of his practice he has specialized in this and allied [1644] fields.

7. Deponent kept records of the time spent, which records will be made available to Court and counsel. Past experience and some cursory checking demonstrate that the recorded time represents only about 80% of the time actually expended. The records show some 571 hours over a four year period; a fair estimate of the actual time expended, properly adjusted to reflect recorded and unrecorded time, is 685 hours.

8. Using the 20% adjustment in some instances only, an approximate and on the conservative side breakdown of the records for the four year period discloses:

21 court appearances;
Three trips to Anaheim;
Two trips to Corona;
Six depositions of defendants;

Two sessions of depositions of Nicholas J. Winckler (at Corona);

30 motions and petitions;
25 law memoranda;
425 telephone calls;
75 conferences;
250 letters;

150 miscellaneous documents including interrogatories, admissions, memoranda, stipulations, orders and pleadings.

9. The Court is respectfully requested to take judicial notice of the legal papers prepared and filed by deponent herein, as well as the papers filed by the defendants in the first three and one-half years of the litigation. [1645]

10. The difficulties of this lawsuit were seen at the outset when defendants, represented by local and out of state counsel, argued in excess of six hours in an all-out by unsuccessful challenge to the original Complaint, containing five separate and independent causes under federal and California statutes.

11. Discovery was particularly extensive and exhausting including as it did some seven depositions, hundreds of interrogatories, dozens of admissions, and the production of thousands of records and documents.

12. In deponent's own preparation he had ana-

lyzed and digested the pleadings, the depositions, interrogatories and admissions, so that he was able to turn over to Mr. Dixon organized files. Again, this is not stated to detract one whit from Mr. Dixon's and Mr. Irwin's monumental task.

13. Prior to this deponent's obtaining $2500.00 in settlement from a dismissed defendant, plaintiff and intervener were seriously handicapped by the lack of funds with which to prosecute this lawsuit. Deponent was compelled to conduct his discovery in as economical a manner as has probably any other major lawsuit in this area. Each deposition had to be succinct and not wasteful of an extra question. Interrogatories had to be worded so as to avoid production of records at plaintiff's cost. Each hour spent by your deponent had to derive the most benefits. Deponent had to absorb costs which are very often charged to a client. Transcripts of proceedings had to be borrowed from the defendants, therefore read immediately and returned. The fact is that so far as concerns your deponent, and what he knows of his associates it is true of them, this lawsuit was as carefully and as tautly prepared as any lawsuit [1646] in the District.

14. In this lawsuit there was no prima facie government decree. Apart from the normal difficulties of a case of this kind and the normal aggressive resistance of opposing counsel, this case was truly marked by what has been suggested as "a war of attrition" on the part of opposing counsel, particularly out of state counsel representing the defendants during this deponent's more active period.

15. Again, without in the least detracting from the difficulties caused Mr. Dixon and Mr. Irwin by opposing counsel, deponent must allude to the fact that he was subjected alone to the "war" for almost three and one-half years.

16. Finally, reference should be made to a number of intangible problems which beset your deponent, as well as his colleagues: the first was the fact that Sunkist was a great co-operative and the plaintiff's president a foreign-born small processor; the second was the great amount of legal talent and resources which the defendants brought into the lawsuit; and the third was the ability of the defendants not only to wage legal war, but psychological war over a four year period, obtaining continuance after continuance of the trial and ever expanding their discovery and pretrial procedures.

17. Wherefore, because of the unusual difficulties of this litigation, compounded by opposing counsel, in a pioneering lawsuit against a great citrus fruit trust, your deponent prays that Mr. Dixon and Mr. Irwin, as well as himself, be awarded a substantial fee of not less than 25% of the verdict as [1647] trebled, payable to them by defendants.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 12th day of February, 1956.

[Seal] /s/ GLORIA J. SCHWEITZER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 18, 1947. [1648]

[Title of District Court and Cause.]

Nos. 53,860—C and 13788—C

AFFIDAVIT OF HARRY M. IRWIN IN SUPPORT OF APPLICATION TO TAX PLAINTIFF'S ATTORNEYS' FEES AS COSTS

State of California,
County of Los Angeles—ss.

Harry M. Irwin, being first duly sworn, on oath states:

Ever since April, 1952, affiant has been and is attorney for Ronald Walker, as Trustee in Bankruptcy of plaintiff Winckler & Smith Citrus Products Co., and as Intervenor in the above-entitled action, and as such attorney affiant has participated in all of the proceedings in the above-entitled action subsequent to said date.

Affiant is a member of the Bar of the States of California and [1649] Missouri and a member of the Bar of this District Court and continuously since 1916 affiant has engaged in the practice of his said profession in the Courts of the State of California and in this Court, and throughout said time affiant has specialized in the practice of civil law in connection with the business transactions of corporations and of individuals and the legal problems and litigation arising therefrom.

Because of the lack of funds available to said Trustee, affiant has been unable to employ investigators to assist plaintiffs' attorneys in the necessary

investigations and preparations for and in the trial of this action, and affiant was required to and did personally and in association with his co-counsel William C. Dixon and with Trustee Ronald Walker, examine and digest the voluminous and complex records and facts of the plaintiff Winckler & Smith Citrus Products Co., and of the defendants pertinent to the issues in this action, and also the questions of law applicable thereto; and affiant avers that he has spent in excess of 2,000 hours in the reasonable and necessary preparation for the trial of said action and in the trial thereof.

Affiant embodies in this affidavit, by reference thereto, and avers all the facts within his knowledge which are set forth in the affidavit of William C. Dixon which is filed concurrently herewith.

Affiant avers that the sum of $350,000.00 is a reasonable sum to be allowed and taxed as costs against the defendants herein for the necessary and proper legal services which have been rendered by plaintiffs' attorneys in the above-entitled action.

/s/ HARRY M. IRWIN.

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ BEN M. KOCHMAN,
Notary Public in and for said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956. [1650]

[Title of District Court and Cause.]

No. 13788—C

NOTICE OF MOTION OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY FOR JUDGMENT IN ACCORDANCE WITH SAID DEFENDANTS' MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE IN THE TRIAL OF THE ABOVE-ENTITLED ACTION

To: Winckler & Smith Citrus Products Co., a corporation, the above-named plaintiff and [1661] to Bernard Reich, Esq., its attorney; and

To: Ronald Walker, Esq., trustee and intervener, and to Harry M. Irwin Esq., attorney for said trustee; and

To: William C. Dixon, Esq., attorney for plaintiff and said intervening trustee.

Please Take Notice that the undersigned will bring the attached motion by defendants Sunkist Growers, Inc., and The Exchange Orange Products Company, for judgment in accordance with said defendants' motion for a directed verdict at the close of all the evidence in the trial of the above-entitled action, and the memorandum of points and authorities in support thereof attached thereto, on for hearing before this court in the courtroom of the Honorable James M. Carter, District Judge, United States Post Office and Court House Building, located at

Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, on the 24th day of February, 1956, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 17th day of February, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendant Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of a copy of the foregoing Notice of Motion and of Motion referred to therein and of accompanying Memorandum of Points and Authorities is acknowledged this 17th day of February, 1956.

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and Intervening Trustee.

/s/ HARRY M. IRWIN,
Attorney for Trustee;

By /s/ RONALD WALKER. [1662]

Good cause appearing therefore, the hearing on the foregoing mentioned motion is hereby set for Friday, February 24, 1956, at 10:00 a.m. of said day,

and the clerk is directed to set said notice of motion and motion for hearing on said day. Defendants are directed to serve and file said notice of motion and motion upon opposing counsel on or before Monday, February 20, 1956.

Dated this 17th day of February, 1956.

/s/ LEON R. YANKWICH,
District Judge. [1663]

[Title of District Court and Cause.]

No. 13788—C

MOTION OF DEFENDANTS FOR JUDGMENT IN ACCORDANCE WITH THEIR MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

Now come the defendants, jointly and severally, after the verdict rendered for plaintiff on February 10, 1956, and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure move the Court to set aside such verdict and to enter judgment for the defendants, and each of them, in accordance with their motion for a directed verdict at the close of all the evidence; and for grounds of said motion urge the following, which were the grounds of their motion for a directed verdict at the close of all the [1664] evidence:

First Cause of Action

1. The first cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of th Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the Tree-Sweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

4. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

5. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices. [1665]

11. Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint as amended.

Second Cause of Action

1. The second cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

4. Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus, fruit juices, or any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

5. Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries. [1666]

10. Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

11. Plaintiff has failed to prove that citrus fruit juices, or any citrus fruit juice, produced or processed in California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

12. Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monopolize.

13. Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint as amended.

Dated this 17th day of February, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for
Defendants. [1667]

Memorandum of Points and Authorities in Support of Defendants' Motion for Judgment in Accordance With Their Motion for Directed Verdict at the Close of All the Evidence

1. A claim was not stated or proved upon the first cause of action.

Canella v U.S.
157 Fed. (2d) 470 (C.A. 9th, 1946).

2. Defendants are exempt from the antitrust laws and no conduct outside the exemption was proved.

Clayton Act, Sec. 6, 15 U.S.C. Sec. 17.

Capper-Volstead Act, Sec. 1, 7 U.S.C. 291.

California Agricultural Code, Secs. 1213, 1216, 1218, and 2021.

Cape Cod Food Products v National Cranberry Assn., 119 Fed. Supp. 900, 907, 908 (Mass., 1954).

3. Any claim, except upon the TreeSweet contract, is barred by the statute of limitations.

California Code of Civil Procedure, Sec. 338. Subd. 1.

Burnham Chemical Co. v Borax Consolidated, 170 Fed. (2d) 569, 572 (C.A. 9th, 1948), cert. den. 336 U.S. 924.

Suckow Borax Mines Cons. v Borax Consolidated, 185 Fed. (2d) 196, 207 (C.A. 9th, 1950), cert. den. 340 U.S. 943.

4. In order to prove a claim plaintiff must allege and prove a public injury.

Shotkin v Gen. Electric Co., 171 Fed. (2d) 236 (C.A. 10th, 1938). [1668]

Emich Motors Corpn. v General Motors Corpn. 181 Fed. (2d) 70, 75 (C.A. 7th, 1950) and other cases cited in defendants' final brief filed herein November 23, 1955.

5. No legal right owned by plaintiff was invaded.

Patten v Dennis, 134 Fed. (2d) 137. (C.A. 9th, 1943).

Sidebotham v. Robison, 216 Fed. (2) 816, 831 (C.A. 9th, 1954).

Keogh v Chicago & Northwestern Ry. Co., 260 U.S. 156, 163 (1952).

6. There was no monopoly by defendants of either product citrus fruit or citrus fruit juices.

U.S. v Aluminum Co. of America, 148 Fed. 2d) 416 at p. 424, (C.A. 2d, 1945).

Cape Cod Food Products v National Cranberry Assn., 119 Fed. Supp. 900, 907, 908 (Mass., 1954).

Respectfully submitted,

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER.

[Endorsed]: Filed February 17, 1956. [1669]

[Title of District Court and Cause.]

No. 13788-C

Answer to Plaintiff's Application for Allowance of Attorneys' Fees and Points and Authorities in Support of Said Answer

Come now the defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company, by attorneys, and answer plaintiff's application for attorneys' fees filed herein on February 13, 1956, as follows:

Answering plaintiff's application itself (p. 1, ll. 20-23), defendants submit to the Court that an allowance of $350,000 for attorneys' fees for services rendered in the above-entitled action would be unreasonable and excessive and would result in manifest [1677] injustice to these defendants; and defendants further submit that any allowance in excess of $100,000 to $125,000 would be unreasonable and excessive.

Further answering said application, defendants state that none of the attorneys for plaintiff are of such eminence, ability and standing at the bar of this Court or other local courts, or have commanded such fees or daily or hourly rates as would entitle plaintiff to any such allowances as is sought here.

The Dixon Affidavit

Answering the affidavit of Mr. Dixon, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the

statement (p. 2, 11. 24 to 27) that Mr. Dixon spent substantially all of his time since September, 1954, in the preparation and trial of this action, or as to the truth of the statement that he spent approximately in excess of 2500 hours of work as an attorney in the course of preparing and trying this action; and in this connection defendants state that Mr. Dixon has informed their counsel that during the period from September 27, 1954, to December 8, 1954, he spent approximately 116½ hours on this case as shown by his time records to that date, and that since that time he has kept no record of the time spent by him on the case. Defendants further state that the number of trial days was 33.

Further answering the affidavit of Mr. Dixon (p. 3, 11. 3 to 5), defendants state that, while there may have been problems or questions of law on which there were no decisions directly in point, these problems or questions of law in no way complicated the preparation and presentation of plaintiff's case or the cross-examination of defendants' witnesses.

Further answering the affidavit of Mr. Dixon (p. 3, 11. 3 to 14), defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the statement that Mr. Dixon was without any funds with which to secure proper and [1678] investigative assistance in preparation for trial, or the truth of the statement that the only legal assistance available to him was the assistance of Harry M. Irwin, or the truth of the

statement that it was accordingly necessary for Mr Dixon personally to do much of the investigative and preparatory work; and in this connection defendants state that whether plaintiff was with or without sufficient funds is not relevant to the question of what is the reasonable value of the services of plaintiff's attorneys in this case; and defendants further state that if, as Mr. Dixon says, it was necessary for him to spend a substantial part of his time doing the work of a law clerk or the work of investigator, such portion of his time, the amount being unknown to defendants, should be evaluated by the Court on a substantially lower basis than time spent by him as an attorney in the actual preparation and trial of the case.

Further answering Mr. Dixon's affidavit (p. 3, 11. 16-19), defendants state that prior to March 21, 1955, the firm of Pope & Ballard represented only ELP; that until about July, 1955, only two members of the firm spent any substantial time on the case, that thereafter there were occasionally four but for the most part only three members of the firm working on the case, and that during the immediate pretrial and actual trial of the case there were three members of the firm actively engaged in the case.

Further answering Mr. Dixon's affidavit (p. 3, 11. 21 to 27), defendants say that the compensation of defendants' accountants is in no way relevant to the question of what is the reasonable value of the services of plaintiff's attorneys in this action.

Further answering Mr. Dixon's affidavit (p. 3, 11. 31-32, p. 4, 11. 1-4), defendants state that the amount paid by defendants to their attorneys for defending this action, whether such amounts were reasonable or unreasonable, has no bearing whatever upon the reasonable value of the services of plaintiff's attorneys in this case. Without in anywise admitting that the amount paid by [1679] defendants to their attorneys is a proper factor for the Court's consideration, defendants deny that such amount has or will begin to approach the $350,000 asked for by plaintiff.

Further answering Mr. Dixon's affidavit (p. 4, 11. 4-6), defendants deny that $350,000 is a reasonable charge for services rendered to plaintiff by its attorneys in this action.

The Irwin Affidavit

Answering Mr. Irwin's affidavit (p. 11. 27-31), defendants deny that Mr. Irwin has been attorney for the trustee in bankruptcy of the plaintiff since April, 1951.

Further answering Mr. Irwin's affidavit (p. 2, 11. 7-16), defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the statement that Mr. Irwin spent in excess of 2000 hours in the preparation and trial of this action; and in this connection defendants state that Mr. Irwin has informed their counsel that he has kept no complete or accurate records of the time spent by him on this case. Defendants

further state that it is plain from Mr. Irwin's affidavit that his services, being largely those of an investigator and assistant to Mr. Dixon, should be valued on a substantially lower basis than the services rendered by Mr. Dixon as an attorney.

Further answering Mr. Irwin's affidavit (p. 2, 11. 20-23), defendants deny that the sum of $350,000 is a reasonable sum to be allowed herein for the necessary and proper legal services rendered by plaintiff's attorneys.

The Reich Affidavit

Answering paragraph 2 of Mr. Reich's affidavit, defendants deny that Mr. Reich was the sole attorney for the plaintiff until October 21, 1955, or that he became junior to Mr. Dixon on that date. Defendants are without knowledge or information as to whether Mr. Reich rendered any service for any party in this case after he withdrew as attorney for the trustee on or about October, 1954. [1680]

Further answering Mr. Reich's affidavit, defendants are without sufficient knowledge or information to form a belief as to the truth of the statements contained in paragraphs 4, 5, 6, 7, and 8, except that defendants admit that Mr. Reich made a number of court appearances and participated in the taking of various depositions.

Answering paragraph 10 of Mr. Reich's affidavit, defendants state that their challenge to the original complaint was well taken, as is borne out by the

fact that the Court directed plaintiff to file an amended complaint in December, 1954, and that ultimately the theory of plaintiff's second cause of action was substantially altered and the third, fourth, and fifth causes of action were abandoned by the plaintiff altogether.

Answering paragraph 11 of Mr. Reich's affidavit, defendants state that the discovery in this cause was no more extensive than is customary in a treble damage action of this sort. The record in this case shows that Mr. Reich opposed defendants' discovery at nearly every opportunity, that he was ordered to file additional answers to many of defendants' interrogatories because of his failure to file adequate answers in the first instance, and that his opposition to the production of plaintiff's records for the inspection of defendants' attorneys very substantially increased the amount of time required to be spent by defendants' attorneys in discovery, with the result that many of plaintiff's files were not made available to defendants until the eve of the trial, and in a few instances, until after the trial had commenced.

Answering paragraph 12 of Mr. Reich's affidavit, defendants are without knowledge of information sufficient to form a belief as to the truth of the statements therein.

Answering paragraph 13 of Mr. Reich's affidavit, defendants are without knowledge or information sufficient to form a belief as to the truth of the statements therein.

Answering paragraphs 14 and 15 of Mr. Reich's affidavit, [1681] defendants deny that they carried on any "war of attrition" or that they did anything other than to defend to the best of their ability against an action which they still believe to be entirely unfounded. Defendants state that much of what Mr. Reich describes as a "war of attrition" was simply defendants' refusal to be thwarted by Mr. Reich's opposition to the discovery which defendants were entitled to obtain, and in large part ultimately did obtain, under the Federal Rules of Civil Procedure.

Answering paragraph 16 of Mr. Reich's affidavit, defendants state that the comparative size and importance of Sunkist and plaintiff and the foreign birth of plaintiff's president are wholly irrelevant to the question of what is the reasonable value of the services rendered by plaintiff's attorneys. Defendants deny that they sought or obtained continuance after continuance of this action and state that, except for illness, the only grounds on which they sought the one or two continuances they did seek were that plaintiff had failed or refused to make its records available to defendants' counsel in accordance with the orders of this Court.

Defendants deny the allegations of paragraph 17 of Mr. Reich's affidavit.

Further answering plaintiff's application for attorneys' fees, defendants deny that in excess of 5000 hours were reasonably and properly expended by plaintiff's attorneys in the preparation and trial of

this action, or if this number of hours had actually been reasonably necessary and proper that plaintiff's attorneys would be entitled to fees which amount to approximately $70 per hour for the time spent, irrespective of whether it was Mr. Dixon's time or Mr. Irwin's time or Mr. Reich's time, and irrespective of whether the time was spent in important legal work or in work which could have been performed by junior attorneys or clerical or investigative personnel.

Further answering plaintiff's application for attorneys' [1682] fees, defendants are informed and believe and therefore state the fact to be that substantial portions of the time spent by Mr. Dixon involved work which could have been as well performed by a junior attorney or by a clerk, that substantial portions of Mr. Irwin's time was spent in work which is normally performed by an assistant, or junior attorney, or in work which is normally not performed by a lawyer at all, and that substantial portions of Mr. Reich's time were likewise spent in work which is normally performed by a junior, or assistant attorney, and that in each such case the time involved should be valued accordingly.

Further answering plaintiff's application for attorneys' fees, defendants are informed and believe and therefore state the fact to be that there was substantial duplication of effort between Mr. Reich and Mr. Dixon when Mr. Dixon entered the case; and defendants deny that the time spent by Mr. Dixon in such duplication of work performed by Mr.

Reich should be considered as time reasonably and properly expended in the preparation and trial of this action.

Further answering plaintiff's application for attorneys' fees, defendants are informed and believe and therefore state the fact to be that a substantial portion of the time expended by plaintiff's attorneys was spent in connection with the liability of TreeSweet Products Company and Exchange Lemon Products Company, both of which companies were dismissed as defendants on plaintiff's motion, and in connection with establishing and proving the third, fourth and fifth causes of action and the alleged attempt to monopolize on the part of Sunkist, Exchange Orange Products Company and Exchange Lemon Products Company, all of which causes of actions and claims were voluntarily dismissed by the plaintiff. Defendants deny that the time so spent by attorneys for the plaintiff was time reasonably and properly expended in the preparation and trial of this action. [1683]

Wherefore, defendants deny that the attorneys' fee of $350,000 sought by plaintiff is a reasonable fee under all the circumstances, and allege that any allowance of fees in excess of $100,000 to $125,000 would be unreasonable and excessive.

ROSS C. FISHER,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled action; that he has read the foregoing answer and is familiar with the contents thereof and believes the same to be true and correct.

/s/ ROSS C. FISHER.

Subscribed and sworn to before me this 23 day of February, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for said County and State. [1684]

Defendants' Memorandum of Points and Authorities Re Plaintiff's Application for Attorneys' Fees

Plaintiff has obtained a jury verdict against the defendants in the amount of $500,000. Application has been made to the Court for an allowance of attorneys' fees of $350,000, pursuant to Section 4 of the Clayton Act (15 U.S.C.A., Sec. 15). This memorandum is submitted in opposition to plaintiff's application for fees.

The courts have very generally recognized that the matter of fixing attorneys' fees is a matter of great difficulty and delicacy. No iron-clad and in-

flexible rule can be laid down as to what constitutes a reasonable fee, but the courts have usually approached the problem as one of quantum meruit, and have applied the principles entirely on that doctrine. In all of the cases dealing with allowances for professional services the courts have taken the position that judges should be reluctant to engage in what Taft, Ch. J., has called "vicarious generosity," Re Gilbert, 276 U.S. 294.

The determination of what is a reasonable attorneys' fee rests largely in the discretion of the trial judge, provided that he has given consideration to proper factors and not to improper elements and that his discretion has not been improvidently exercised. Milwaukee Towne Corp., v. Loew's, Inc., 190 F. 2d 561 (C.A. 7, 1951).

The factors which are considered proper in determining a reasonable fee have been held to be the following. (See Rogers v. Hill, 34 F. Supp. 358, 363.)

1. The time and labor which has been fairly and properly expended in the case.

2. The novelty and difficulty of the questions presented and the quality of skill demanded in the case.

3. The skill employed by counsel.

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer. [1685]

5. The result achieved.

6. The eminence, ability and standing of the counsel.

7. The testimony of experts.

The factors which are not to be taken into consideration in determining what is a reasonable fee are the following:

1. The ability of the defendants to pay.
2. The financial condition of the plaintiff.
3. Uncertainty of the fee.
4. Punitive damages resulting from trebling the verdict.
5. Fees paid to defendants' attorneys.

I.

Matters to Be Considered

1. The time fairly and properly devoted to the case.

The general rule is that the amount of time reasonably necessary for the accomplishment of the work performed, rather than the actual time consumed, is the proper standard of time to be considered in determining a reasonable fee. Rogers v. Hill, 34 F. Supp. 358 (S.D. N.Y. 1940).

The general rule is, further, that the amount to be determined as a reasonable counsels' fee is not to be measured by the number of attorneys involved, but rather by the value of the services performed. Re Vicksburg Bridge & Terminal Co., 29

F. Supp. 225 (S.D. Miss., 1938); Waters v. Hamilton Gas Co., 29 F Supp. 436 (S.D. W. Va., 1939).

It is well established that unnecessary duplication of effort is not compensible in a statutory fee proceeding. Waters v. Hamilton Gas Co., 29 F. Supp. 436, supra; Re N.Y., N.H. & Hartford Ry., 46 F. Supp. 214 (D. Conn., 1942); Strauss v. Baker Co., 87 F. 2d 401, 408 (C.A. 5, 1937).

2. The novelty and difficulty of the question presented and the quality of skill demanded in the case. [1686]

A factor to be considered in the determination of reasonable attorneys' fees is the degree of difficulty involved. See 143 A.L.R. 672, 678; Cf. Milwaukee Towne Corp., v. Loew's, Inc., 190 F. 2d 561, 570-571, supra.

Defendants submit that the questions involved in this action are no more complicated or difficult than the questions involved in the usual antitrust case and that any competent trial lawyer could have made the necessary preparation and tried the case properly.

3. Skill employed by counsel.

Defendants concede that the case was well and ably tried by Mr. Dixon. It was as skillfully tried as the necessities of the case required, but it was tried no better than would have been expected from any reasonably able trial lawyer. Conceding that

Mr. Dixon prepared and tried the case well, it still does not follw that $70 an hour is a reasonable fee for 2,500 hours of Mr. Dixon's time, when admittedly a great deal of it was devoted to work which could have been as well performed by junior attorneys or investigators; nor does it follow that $70 an hour was a reasonable fee for 2000 hours of Mr. Irwin's time, or 571 hours of Mr. Reich's time, when it does not appear that they brought any unusual skill to the case at all. Cf. Milwaukee Towne Corp., v. Lowe's, Inc., 190 F. 2d 561, 570-571, supra.

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

Since the plaintiff was insolvent, it had everything to win and nothing to lose. The plaintiff itself risked nothing in this case and there was consequently no commensurate responsibility of counsel.

5. The result achieved.

The result achieved is, of course, a factor in determining what constitutes a reasonable fee for legal services performed. While the verdict in the instant case was substantial, examination of [1687] similar cases and the fees allowed therein indicates that the fees sought by counsel for the plaintiff are greatly excessive and substantially larger than have customarily been allowed in comparable cases. See Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570-571, supra (verdict $431,959.42, fees of

$225,000 reduced to $75,000); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (C.A. 8, 1952) (verdict $375,000 fees of $150,000 reduced to $100,000 including fees on appeal); Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251 (1946) (verdict $120,000, fees $30,000); Applebaum and Sims v. Paramount Pictures, Inc., C.C.H. Trade Cases 1950-1951, par. 62944 (U.S.D.C., S.D. Miss., 1951) (verdict $150,000, fees $40,000); Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242 (D. Mass., 1954) (verdict $175,000, fees $35,000); and see annotation in 143 A.L.R. 672-958. It should also be observed that the courts have generally taken the position that the relative amount of fees should be reduced as the verdict or judgment becomes larger. Hodgman, et al., v. Atlantic Refining Co., 8 F. 2d 777 (D. Del., 1925).

6. Ability and standing of counsel.

An important reason why the application for attorneys' fees in the sum of $350,000 in this case is manifestly unreasonable and excessive is that it not only assumes that all of the counsel for plaintiffs were top grade trial lawyers, but that all of their time should be compensated for at top rates, although admittedly a very substantial part of their time was devoted to matters that could be handled, and normally are handled, by lawyers of less than top ability, or by clerks. Obviously, much of the work in question could have been performed by a

$5 or $10 an hour clerk, and much of it could have been performed by $10 and $15 an hour junior attorneys. If a senior lawyer chooses to perform those duties, he must do so at the rate of the job. As the court said in Re Charles v. Glass, Inc., 47 F. Supp. 428, 430 (S.D. Cal., C.D., 1942):

"* * * An attorney should not be compensated at [1688] lawyer's rates for the work which a clerk or amanuensis can do cheaper, if not better."

See also, Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570-571, supra.

7. The testimony of experts.

It is customary, in cases of this kind, for courts to receive expert testimony. Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570, supra. Since, however, this memorandum is being submitted in advance of the hearing on plaintiff's application for attorneys' fees, it is not possible to refer to the testimony of experts, even if such testimony should be received or considered by the Court.

II.

Items Not Properly Considered in Determining Attorneys' Fees

There are a number of factors which it is generally recognized are not to be considered in determining reasonable attorneys' fees. These are the following:

1. The ability of the defendants to pay.

2. The financial condition of the plaintiff.
3. Uncertainty of the fee.
4. Punitive damages resulting from trebling the verdict.
5. Fees paid to defendants' attorneys.

1. The ability of the defendants to pay.

While it is recognized that the poverty of a defendant may be a factor to be considered in reducing a fee below what might be considered reasonable compensation for services rendered, it is equally clear that the wealth of a defendant cannot be considered to enhance the fees for services above what constitutes reasonable compensation for services actually rendered. Canon 12 of the Canons of Professional [1689] Ethics provides as follows:

> "A client's ability to pay cannot justify a charge in excess of the value of the services, though his poverty may require a less charge, or even none at all."

It is obvious that this principle should control in fixing the compensation of counsel under a statute which sets the standard of a "reasonable" attorneys' fee.

2. The financial condition of the plaintiff.

While no authority has been found on this subject, it is submitted that the reasonable value of the services of plaintiff's counsel can and must be determined without regard to the financial condition of plaintiff and that there should be included in the

judgment against defendants no more than the reasonable value of these services, whatever the financial condition of the plaintiff. Cf. Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242, supra.

3. Uncertainty of the fee.

The fact that an attorney's compensation is contingent upon his success may be taken into consideration in an action as between him and his client, but where an allowance of attorneys' fees is sought under a statute providing for "reasonable attorneys' fees," it is held that the fact that counsel was serving under a contingent fee arrangement may not be taken into consideration in determining what constitutes a reasonable fee for the services performed. Dumas v. King, 157 F. 2d 463, 466 (C.A. 8, 1946); Business Men's Assurance Co. v. Campbell, 18 F. 2d 223 (C.A. 8, 1927); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, supra; Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, supra; Applebaum and Sims v. Paramount Pictures, Inc., supra.

4. Punitive damages resulting from trebling the verdict.

The amount which is to be considered in determining a "reasonable" fee is the actual amount of the damages and not the [1690] punitive recovery resulting from the trebling of the verdict. The statute provides for the trebling of plaintiff's dam-

ages but says nothing about trebling the fees of their counsel. Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, supra; Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, supra; Applebaum and Simes v. Paramount Pictures, Inc., supra.

5. Fees paid to defendants' attorneys.

Defendants submit that the amount of fees paid by the defendants to their attorneys is entirely irrelevant to the question of what is a reasonable fee for the services of plaintiff's attorneys. Defendants' attorneys may have been paid more or less than the reasonable value of their services; and in an action of this sort it is clear, in any event, that the reasonable value of the services of defendants' attorneys would differ from the reasnable value of services of plaintiff's attorneys. One may be very sure that there would be strenuous objection from the plaintiff if defendants, having paid their lawyers less than what plaintiff is seeking, contended that plaintiff's attorneys were entitled to no more than defendants' attorneys. See Eggleston v. Bordman, 37 Mich. 14 (1877); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889).

It is respectfully submitted that a reasonable fee to be allowed plaintiff in this case should not exceed $100,000 to $125,000, and might properly be considerably less.

/s/ ROSS C. FISHER.

[Endorsed]: Filed February 23, 1956. [1691]

In the United States District Court Southern District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, Intervening Trustee,

Plaintiffs,

vs.

SUNKIST GROWERS, INC., a Corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, et al.,

Defendants.

FINAL JUDGMENT

The above-entitled cause came on regularly for trial on the 13th day of December, 1955, before the court, the Honorable James M. Carter presiding, sitting with a jury; William C. Dixon appearing for the plaintiff and intervening trustee, and Harry M. Irwin appearing also for the intervening trustee; Ferris E. Hurd, Thomas C. Strachan, Melville Williams, Donald D. Stark, and Ross C. Fisher appearing for the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation; Bernard Reich being attorney of record also for the plaintiff; evidence both oral and documentary having been introduced, and the plaintiff and intervening trustee having been granted leave to file and having filed a Second Amended Complaint for treble damages and equit-

able relief, and the defendants having filed their answer thereto, and the case having been argued and the jury instructed by the Court, and the cause submitted to the jury for its verdict, and the jury having [1712] returned its verdict on February 10, 1956, in favor of the plaintiff and the intervening trustee and against the said defendants in the sum of $500,000 and defendant TreeSweet Products Co., a corporation, having paid to the intervening trustee the sum of $2,500 as only partial compensation for the damages alleged in the complaint in the above-entitled action to have been suffered by the plaintiff, and the plaintiff having dismissed said action against defendant TreeSweet Products Co. without prejudice and without costs, and the plaintiff and the intervening trustee having made application pursuant to the provisions of Section 4 of the Clayton Act for a reasonable attorney's fee, and evidence, both oral and documentary, having been introduced thereon, and said application and the evidence thereof having been argued and submitted to the Court and findings on attorneys' fees, having been waived in open court, and the Court having found and determined that the sum of $195,000.00 is a reasonable attorney's fee in the above-entitled action to the date hereof, and that the plaintiff and the intervening trustee are entitled to recover said amount from the defendants as and for a reasonable attorney's fee in said action;

Wherefore, by virtue of the provisions of Section 7 of the Sherman Act, (26 Stat. 210, 15 U.S.C. Sec.

15) and Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed as follows:

(1) Plaintiff Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, Intervening Trustee, do have and recover from the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and from each of them, the sum of $1,500,000 or three-fold the damages found by the jury to have been suffered by the plaintiff and Intervening Trustee, less the sum of $2,500 which the Intervening Trustee has received from TreeSweet Products Co. as partial compensation for said damages, viz.: The sum of $1,497,500, together with costs and disbursements incurred in this action in the sum of $705.54.

(2) Plaintiff and Intervening Trustee do have and recover from the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and each of them, as and for a [1713] resonable attorney's fee the sum of $195,000.00.

(3) The Court reserves jurisdiction of the issues of equitable relief requested by the plaintiff and the Intervening Trustee and finds that there is no just reason for delay in entering judgment on the verdict of the jury and hereby orders that final judgment in the amount of $1,692,500.00 be entered

accordingly against the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and each of them, as provided for herein.

Dated: March 5, 1956.

/s/ JAMES M. CARTER,
Judge of the District Court.

Approved as to form.

FERRIS E. HURD,
THOMAS C. STRACHAN,
MELVILLE WILLIAMS,
DONALD D. STARK,
ROSS C. FISHER.

By /s/ ROSS C. FISHER,
Attorneys for Defendants,

[Endorsed]: Filed March 5, 1956.

Docketed and entered March 5, 1956. [1714]

[Title of District Court and Cause.]

No. 13788-C

MEMORANDUM TO COUNSEL

The court heretofore, as the close of the hearing on attorney's fees indicated to counsel what it thought to be the appropriate factors to be considered, and what it thought to be the inappropriate factors which should not be considered. As to two

items, the court was in doubt, (1) whether the trebling of the verdict could be taken into account in fixing attorney's fees, and (2) whether the amount paid to counsel for the defendants was a proper matter for consideration.

The court now reiterates its position as to the factors to be considered and not considered, and also states its views on the two matters left open.

The Rent and Price Control cases, although involving a treble damage suit and a provision for attorney's fees similar to the one involved in this case are not helpful; [1716] the amounts were small; the problem of considering the trebled amount has not been considered. Several cases have considered the treble damage provisions of the antitrust statute and have held that the amount as trebled, may not be considered in fixing attorney's fees. This court does not approve or disapprove of such cases. It states that in fixing the award of attorney's fees, it has not specifically looked to the trebling of the verdict.

This court thinks that the amount paid to the defendants as attorney's fees is a factor that may be considered but is only to be considered in connection with all the other evidence and facts in the case.

The court has considered:

1. The time and labor which have been fairly and properly expended by the attorneys in this case;

2. The novelty and difficulty of the questions

presented and the quality of skill demanded in the case;

3. The high degree of evidence and skill demonstrated by Messrs. Reich, Dixon, and Irwin;

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer;

5. The result achieved, namely the verdict for $500,000 in a difficult and hard fought case;

6. The eminence, ability, and standing of the counsel for the plaintiff. Reich was previously associated with an outstanding law firm in the community which had handled antitrust matters, and he had handled and participated in the handling of them while with the firm. He analysed the situation and prepared the original complaint. Mr. Dixon is an outstanding authority in the field of antitrust; has had long and distinguished service with the government and has been eminently successful in the handling of antitrust matters [1717] entrusted to him. Mr. Irwin is a long time member of this Bar and an able practitioner who diligently assisted in this case;

7. The court has considered the testimony of experts, but to a very small extent. None of the experts participated in the trial or sat through it, and the Court feels it is more competent to form an opinion on the value of the services than are the experts who answered hypothetical questions, or reviewed the pleadings and affidavits and then rendered an opinion. Finally, the court has called

upon its memory of the trial and proceedings, and to a large degree has been influenced by what transpired during the trial. The Court, although considering the sums paid to defense counsel, has attached no particular significance to the amounts, and the amount now awarded by the court for attorney's fees bears no relationship so far as the court can ascertain, to the fees paid to defense counsel. The Court has definitely not considered the matter as a contingent fee, and has not considered the punitive damages, and has not considered the financial condition of the defendant or its ability to pay.

The Court now fixes the attorney's fees in the sum of $195,000.00.

[Endorsed]: Filed March 5, 1956. [1718]

[Title of District Court and Cause.]

No. 13788-C

MOTIONS OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO SET ASIDE THE VERDICT AND JUDGMENT HEREIN AND FOR A NEW TRIAL

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and

defendant The Exchange Orange Products Company, a corporation, and jointly and severally move the Court to set aside the verdict and judgment herein and to grant a new trial of the above-entitled cause, and further move the Court to stay the execution of any and all proceedings to enforce said judgment pending disposition of the aforesaid motion for new trial; and

In support thereof defendants show the following grounds [1731] and reasons, namely:

1. The Court erred in denying defendant's motion for judgment at the close of plaintiffs' opening statement.

2. The Court erred in denying defendants' motion for a directed verdict at the close of plaintiffs' evidence.

3. The Court erred in denying defendants' motion for a directed verdict at the close of all of the evidence.

4. The Court erred in submitting any issues to the jury.

5. The verdict is contrary to law.

6. There was no substantial evidence to sustain the verdict and the evidence was insufficient to justify the verdict in the following particulars:

First Cause of Action

601. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct

which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

602. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint. [1732]

603. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

604. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

605. Plaintiff has failed to prove any public injury.

606. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

607. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

608. Plaintiff has failed to prove the amount of damage or that any damage resulted to plaintiff from the alleged injury or injuries.

609. Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices.

610. Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint as amended.

Second Cause of Action

611. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona or over products thereof.

612. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act [1733] and Section 1 of the Capper-Volstead Act.

613. Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus fruit juices, or in any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

614. Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose whatsoever to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

615. Plaintiff has failed to prove any public injury.

616. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

617. Plaintiff has failed to prove that plaintiff

was injured as the proximate result of any act or breach of duty of defendants, or either of them.

618. Plaintiff has failed to prove the amount of damage or that any damage resulted to plaintiff from the alleged injury or injuries.

619. Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

620. Plaintiff has failed to prove that citrus fruit juices, or any citrus fruit juice, [1734] produced or processed in California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

621. Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monoplize.

622. Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint as amended.

7. The verdict is contrary to the evidence.

8. The verdict is against the weight of the evidence.

9. The verdict is excessive with respect to the amount of damages and appears to have been given under the influence of passion or prejudice. [1735]

10. The Court erred in receiving over the objections of defendants the following evidence:

1001. Plaintiff's exhibit 4 (Exchange Orange pool returns for 1950-51 season)—In overruling defendants' objection to that portion of the exhibit relating to navel oranges (Tr. 247, lines 1-6, inc.).

1002. Plaintiff's exhibit 6 (Sunkist (Citrus Distributing Plant) shipping records of fruit to Silzle) —In overruling defendants' objection as to materiality as being outside the claimed causes of action and as any claim on the Silzle contract as being barred by the statute of limitations (Tr. 343, line 1 to Tr. 344, line 14, inc.).

1003. Plaintiff's exhibit 7 (Sunkist (Citrus Distributing Plant) shipping records of fruit to Silzle)—In overruling defendants' objection as to materiality as being outside the claimed causes of action and as any claim on the Silzle contract as being barred by the statute of limitations (Tr. 343, line 1 to Tr. 344, line 14, inc.).

1004. Plaintiff's exhibit 11 (Statistics on production by TreeSweet and Silzle under contracts)— In overruling defendants' objection on the grounds of materiality and relevancy to that portion of the exhibit with respect to the Silzle contract on the grounds of the statute of limitations (Tr. 393, line 16, to Tr. 394, line 11, inc.).

1005. Plaintiff's exhibit 25 (Exchange Orange-Silzle 1951 contract)—In overruling defendants' objection on the grounds of materiality and [1736] relevancy and on the grounds of the statute of limitations (Tr. 561, line 5, to Tr. 562, line 15, inc.).

1006. Plaintiff's exhibit 49 (Voucher check, invoices, shipping orders, etc., in connection with Sun-

kist sale of carload of juice to plaintiff—In overruling defendants' objection on ground that claim on account of the transaction was barred by the statute of limitations (Tr. 989, line 1, to Tr. 990, line 4, inc.).

1007. Plaintiff's exhibit 50 (TreeSweet purchase orders)—In overruling defendants' objection on the grounds that claim on account of the transaction was barred by the statute of limitations (Tr. 996, lines 3 to 14, inc.).

1008. Plaintiff's exhibit 58 (Letter Exchange Orange of 8-19-48 to Winkler & Smith re furnishing of oranges to enable plaintiff to comply with Government contrat in 1948)—In overruling defendants' objection to its materiality (Tr. 1765, lin 1, to Tr. 1766, line 15, inc.).

1009. Plaintiff's exhibit 66-A (Hodge computations re Silzle purchasing agreement) (revision of previous plaintiff's exhibit 66, withdrawn from evidence)—In overruling defendants' objections thereto (Tr. 3830, lines 4 to 21, inc.).

1010. Plaintiff's exhibit 69-A (Hodge computations re TreeSweet purchasing agreement) (revision of previous plaintiff's exhibit 69, withdrawn from evidence)—In overruling defendants' objections thereto (Tr. 3827, line 1, to Tr. 3828, line 22, and Tr. 3833, lines 2-12, all inc.). [1737]

1011. Plaintiff's exhibit 71 (EOP inter-office memorandum 8-9-50 Arvel Smith to Finley, Hiby, Franklin, and Hogan re Case-Swayne)—In overruling defendants' objection on the ground of the

statute of limitations (Tr. 2215, line 10, to Tr. 2218, line 6, inc.).

1012. Plaintiff's exhibit 72 (Excerpt from EOP Executive Committee meeting of 1-2-51)—In overruling defendants' objection on the ground of immateriality to the portion relating to navel oranges (Tr. 2220, lines 1-5, inc.).

1013. Plaintiff's exhibit 74 (Excerpts from EOP Executive Committee meeting of 6-13-51)—In overruling defendants' objection on the ground of immateriality (Tr. 2223, lines 16-20, inc.).

1014. Plaintiff's exhibit 79 (Check No. 4472, dated 6-9-49, from Winckler & Smith to N. J. Winckler, in amount of $340.00)—In overruling defendants' objection on the grounds of irrelevancy and immateriality (Tr. 2961, line 8, to Tr. 2962, line 5, inc.).

1015. Plaintiff's exhibit 80 (Check No. 4415, dated 5-4-49, from Winckler & Smith to N. J. Winckler, in amount of $21.33)—In overruling defendants' objection on the grounds of irrelevancy and immateriality (Tr. 2961, line 8, to Tr. 2962, line 5, inc.).

1016. Plaintiff's exhibit 82 (letter 4-26-50 O. E. Hanson of Bank of America to G. B. MacFarland, Kansas City, Mo., re good credit standing of W/S Co.)—In overruling defendants' objections on the grounds of irrelevancy and immateriality [1738] (Tr. 3181, line 15, to Tr. 3182, line 2, inc.).

1017. Plaintiff's exhibit 83 (letter 11-6-51 Ned Lewis of Wilbur Ellis Co., Los Angeles, to W/S re proposed investment in W/S business)—In over-

ruling defendants' objection on the ground of immateriality (Tr. 3191, line 11, to Tr. 3192, line 3, inc.).

1018. By receiving evidence of processing arrangements in effect during periods subsequent to the filing of the Complaint down to the date of trial (Tr. 476, line 25; 485, line 9).

1019. By requiring and allowing Finley to testify hypothetically upon assumptions contrary to and not supported by the evidence (Tr. 642, line 25; 645, line 24; 661, line 20).

1020. By receiving testimony of Clark as to conversations had outside the presence of defendants or any representative of defendants (Tr. 817, line 20, to 821, line 11).

1021. By receiving opinion testimony by Winckler based on assumptions not supported by and contrary to evidence that plaintiff would have made a profit in the year 1951 if it had secured processing arrangement comparable to TreeSweet (Tr. 1007, line 18 to 1008, line 20).

1022. By allowing Winckler to testify over objection from "second hand knowledge." (Tr. 3823, line 18 to 3824, line 10).

1023. By allowing Hodge to testify over objection to his opinion as to the meaning and effect of the Chapter II proceedings and of an order entered therein and appearing herein as [1739] Exhibit 84 (Tr. 3825, line 13, to 3838, line 22).

1024. By allowing Hodge over objection and motion to strike give his opinion and interpretation of

evidentiary matters (Tr. 3844, line 7 to 3849, line 14). [1740]

11. The Court erred by excluding the following evidence offered by defendants:

1101. Defendants' exhibit A (Complete application by Winkler & Smith Citrus Products Company (hereinafter referred to as W/S) to California Division of Corporations)—(Tr. 3752, lines 1-7, inc.).

1102. Defendants' exhibit E (Letter 10/29/48 from Lynch, W/S receiver, to The Exchange Orange Products Company (hereinafter referred to as EOP) re payment for oranges under Government contract)—(Tr. 3755, line 1 to Tr. 3756, line 20, inc.).

1103. Defendants' exhibit F (W/S federal income tax returns for periods 2/1/51-1/31/52, 2/1/50-1/31/51, 2/1/49-1/31/50; and California returns 2/1/51-1/31/52, 2/1/50-1/31/51)—(Tr. 3756, line 21 to Tr. 3758, line 12, inc.).

1104. Defendants' exhibit F-1 (Schedules accompanying WS income tax returns for year ending 1/31/50 showing loss carryovers for 1948 and 1949, etc.)—(Tr. 3756, line 21, to Tr. 3758, line 12, inc.).

1105. Defendants' exhibit I-1, I-2, I-3 and I-4 (W/S Laboratory reports)—(Tr. 3046, line 19 to Tr. 3088, line 7, inc.; and Tr. 3786, line 18 to Tr. 3787, line 23, inc.).

1106. Defendants' exhibit J (W/S production records)—(Tr. 3760, line 11 to Tr. 3765, line 5, inc.).

1107. Defendants exhibit P (Letters 2/2/50 and

2/6/50 from Pavey & Co. to W/S, re Navels)—(Tr. 1420, line 3 to Tr. 1422, line 21, inc.). [1741]

1108. Defendants' exhibit Q (Letter 3/22/50 Bagley & Co. to W/S, Anagold complaint)—(Tr. 1321, lines 10 to 16, inc.; and in striking the exhibit from the evidence (Tr. 1435, lines 5-14, inc.).

1109. Defendants' exhibit T (Letters 5/3/51, 7/16/51 and 11/21/51 Davenport Brokerage Co. to W/S, Anagold complaints)—(Tr. 1463, line 10 to Tr. 1465, line 5, inc.).

1110. Defendants' exhibit U (Letter 5/8/51 Fleming Co. to W/S; letter 9/25/51 W/S to Fleming Co.; letter 8/9/51 Davis Co. to W/S; letter 11/6/50 Fleming-Lacy-Walker to W/S; letter 11/14/50 W/S to Fleming-Lacy-Walker; letters 11/16/50 and 8/7/51 Fleming-Lacy-Walker to W/S)—(Tr. 1465, line 15 to Tr. 1467, line 1, inc.).

1111. Defendants' exhibit AB (Letter 5/16/49 to Mississippi Sales Co., and letter 5/18/49 Mississippi Sales Co. to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1572, line 9 to Tr. 1573, line 5, inc.).

1112. Defendants' exhibit AC (Letter 6/25/49 F. O. Gray to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1574, lines 9 to 16, inc.).

1113. Defendants' exhibit AD (Letter 7/25/49 George F. Seewagen to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1577, line 1 to Tr. 1580, line 18, inc.).

1114. Defendants' exhibit AE (Letter 9/8/49 J. B. Morris Co. to W/S—(Tr. 1465, line 15, to Tr.

1466, line 13, inc.; and Tr. 1582, line 14 to Tr. 1585, line 8, inc.). [1742]

1115. Defendants' exhibit AK (Letter 5/24/49 Irwin R. Tucker Co. to W/S; and letter 5/26/49 W/S to Irwin R. Tucker Co.)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1592, lines 7 to 22, inc.).

1116. Defendants' exhibit AL (Letter 6/3/49 W. L. Young Brokerage Co. to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1592, lines 7 to 22, inc.).

1117. Defendants' exhibit BA (W/S partners' original contribution, writeup of fixed assets, and allocation of writeup to partners)—(Tr. 2399, line 9 to Tr. 2401, line 13, inc.; and Tr. 3787, line 24 to Tr. 3790, line 11, inc.).

1118. Defendants' exhibit BH (Cost to corporation of lease and repurchase agreement with stockholders)—(Tr. 2683, line 7 to Tr. 2685, line 13, inc.; and Tr. 3790, line 13 to Tr. 3791, line 25, inc.).

1119. Defendants' exhibit BI (Withdrawals by N. J. Winckler for Salary, Bonus, Forgiven Debt and Expenses, 2/1/49-1/31/52)—(Tr. 2690, line 3 to Tr. 2699, line 20, inc.; and Tr. 3790, line 13 to Tr. 3793, line 7, inc.).

1120. Defendants' exhibit BJ (Summary of earnings (Hodge-prospectus-Actual), 1/31/47-1/31/51)—(Tr. 3790, line 13 to Tr. 3793, line 7, inc.).

1121. Defendants' exhibit BS (Statement of projected results of operations by W/S on processing 12,000 tons of Valencia oranges under TreeSweet

contract terms)—(Tr. 2988, line 16 to Tr. [1743] 2990, line 13, inc.).

1122. Defendants' exhibit BT (Combined statement of income including actual results for year ended 1/31/52, and projected results of processing 12,000 tons of Valencia oranges under TreeSweet contract terms)—(Tr. 2991, lines 11 to 24, inc.).

1123. Defendants' exhibit BV (Production, Juices, Packs, and season closing prices paid by canners for Florida oranges, 1948-49 to 1950-51)—(Tr. 3773, line 4 to Tr. 3776, line 8, inc.).

1124. Defendants' exhibit BY (Valencia oranges purchased in 1951 by Mutual Citrus Products Company)—(Tr. 2609, line 4 to Tr. 2610, line 8, inc.).

1125. Defendants' exhibit CD (Statement of projected results of operations by Winkler & Smith Citrus Products Co. on processing 12,000 tons of Valencia oranges under TreeSweet contract terms)—(Tr. 2992, line 24 to Tr. 2995, line 22, inc.).

1126. Defendants' exhibit CM (Method of calculating addition of water and sugar, from laboratory record)—(Tr. 3228, line 19 to Tr. 3233, line 1, inc.; and Tr. 3786, line 18 to Tr. 3787 line 23, inc.).

1127. Defendants' exhibit CN (Amount of sugar and water added by W/S to stretch their canned sweetened orange juice)—(Tr. 3228, line 19 to Tr. 3233, line 1, inc.; and Tr. 3786, line 18, to Tr. 3787, line 23, inc.). [1744]

1128. Defendants' exhibit CO (The California Fruit Growers Exchange system, booklet, Circular C-135, May, 1950, by Farm Credit Administration,

U. S. Dept. of Agriculture)—(Tr. 3301, line 25 to Tr. 3302, line 20, inc.).

1129. Defendants' exhibit CP (Letter 9/24/45 Arthur L. Johnson Co. to California Fruit Growers Exchange)—(Tr. 3313, line 24 to Tr. 3314, line 22, inc.).

1130. Defendants' exhibit CQ (Letter 5/27/49 W/S to Mississippi Sales Co.)—(Tr. 3315, line 9 to Tr. 3316, line 6, inc.).

1131. Defendants' exhibit CR (Anagram 6/8/49) —(Tr. 3316, line 7 to Tr. 3317, line 4, inc.).

1132. Defendants' exhibit CT (Letter 7/7/49 W/S to D. V. Brown of Brown-Bell Brokerage Co.) —(Tr. 3321, lines 8 to 24, inc.).

1133. Defendants' exhibit CW (Letter 2/13/50 E. H. Karl & Co. to W/S)—(Tr. 3323, lines 18 to 24, inc.).

1134. Defendants' exhibit CX (Letter 2/17/50 W/S to E. N. Karl & Co.)—(Tr. 3323, line 25 to Tr. 3324, line 9, inc.).

1135. Defendants' exhibit DA (Letter 3/30/50 Brake & Sons, Inc., to W/S)—(Tr. 3326, lines 4 to 11, inc.).

1136. Defendants' exhibit DB (Letter 4/10/50 W/S to Seavey & Flarsheim Brokerage Co.)—(Tr. 3326, line 12 to Tr. 3327, line 11, inc.).

1137. Defendants' exhibit DE (Letter 12/15/50 Brake & Sons, Inc. to W/S)—(Tr. 3330, lines 1 to 18, inc.).

1138. Defendants' exhibit DK (Letter 6/21/51 W/S to Calkins & Co.)—(Tr. 3340, lines 1 to 23, inc.).

1139. Defendants' exhibit DT (Letter 8/10/51 W/S to John N. Canavan Co.)—(Tr. 3344, line 5 to Tr. 3345, line 16, inc.).

1140. Defendants' exhibit DV (Telegram 8/24/51 W/S to Dickensheets-Potter)—(Tr. 3346, line 11 to Tr. 3350, line 5, inc.).

1141. Defendants' exhibit DW (Letter 8/28/51 W/S to Joseph H. Fleming Co.)—(Tr. 3350, lines 6 to 21, inc.).

1142. Defendants' exhibit DX (Letter 9/4/51 W/S to Parrott & Co.)—(Tr. 3351, line 22 to Tr. 3351, line 20, inc.).

1143. Defendants' exhibit DY (Letter 9/7/51 Parrott & Co. to W/S)—(Tr. 3351, line 21 to Tr. 3353, line 5, inc.).

1144. Defendants' exhibit EL (Excerpt from minutes of regular Executive Committee meeting of EOP held 9/19/50)—(Tr. 3391, lines 3 and 4.).

1145. Defendants' exhibit EQ (Excerpt from minutes of regular Board of Directors meeting of EOP held 5/9/51)—(Tr. 3392, line 1).

1146. Defendants' exhibit ER (Excerpt from minutes of regular Board of Directors meeting of California Fruit Growers Exchange held 7/18/51) —(Tr. 3392, line 2).

1147. Defendants' exhibit ET (Excerpt from minutes of regular executive committee meeting of EOP held 7/31/51)—(Tr. 3393, lines 2 to 6, [1746] inc.).

1148. Defendants' exhibit EU (Excerpt from minutes of regular meeting of Board of Directors

of EOP held 8/8/51)—(Tr. 3393, lines 6 to 22, inc.).

1149. Defendants' exhibit EV (Excerpts from minutes of regular Executive Committee meeting of EOP held 8/13/51)—(Tr. 3393, lines 22 to 25, inc.).

1150. Defendants' exhibit EW Excerpts from minutes of regular Executive Committee meeting of EOP held 9/19/51)—(Tr. 3393, line 25 to Tr. 3394, line 3, inc.). [1747]

1151.

1152. By excluding evidence offered on cross-examination of Winckler with respect to the items composing his indebtedness which the corporation forgave without consideration (Tr. 1290, line 4 to 1294. line 10).

1153. By restricting cross-examination of Browne as to whether the consideration of facts appearing of record would, if known to the witness, have affected his appraisal (Tr. 1533, lines 15 to 24).

1154. By restricting cross-examination of Hodge so as to preclude showing by this witness that machinery and equipment was reflected on plaintiff's books at fictitious values (Tr. 1948, line 14 to 1949, line 18).

1155. By restricting cross-examination of Hodge so as to preclude showing by this witness that had the books of plaintiff been kept so as to reflect facts as they actually occurred, there would have been reflected a loss rather than a profit for the six months ended 7/31/49 (Tr. 1996, line 25 to 1997, line 13).

1156. By restricting cross-examination of Hodge so as to preclude showing by this witness that as of

the year ended 1/31/51, the witness set up as an asset items of expense incurred during the year, and that the items so set up as assets were deducted in each of two year for income-tax purposes (Tr. 2017, line 13 to 2019, line 22).

1157. By excluding evidence offered on cross-examination of Hodge to show that the forgiveness of the indebtedness of Winckler to the plaintiff occurred in the year ended January 31, 1950, and that items of expense in the amount of approximately $19,000 were carried over as capital assets from one year to the next and were [1748] deducted as expense for income-tax purposes for both years (Tr. 2112, line 5 to line 21).

1158. By excluding cross-examination of Hodge, with respect to increases of cost levels between 1949 and 1951 (Tr. 2138, line 19, to 2139, line 20).

1159. By excluding and striking from the record testimony of the witness Lynch with respect to the loss reported by plaintiff for Federal income-tax purposes for the year ended January 31, 1949 (Tr. 2421, line 1 to line 16).

1160. By excluding and striking from the record testimony of the witness Lynch that the balance sheet for the year ended January 31, 1950, received in evidence, incorrectly reflects profit or loss for the period (Tr. 2430, line 30, to Tr. 2431, line 15).

1161. By refusing to require plaintiffs to give defendants access to plaintiff's income tax return for year ended January 31, 1950, and in ruling that the offered proof of facts contained therein should be excluded (Tr. 2454, line 2, to Tr. 2456, line 1).

1162. By excluding from the record testimony of Lynch offered to show that Winckler converted corporate assets to his own use (Tr. 2462, line 19, to Tr. 2465, line 24).

1163. By excluding testimony of Lynch offered to show by items writeups in the book value of assets (Tr. 2486, line 17, to Tr. 2487, line 4).

1164. By excluding Exhibit BS and by requiring defendants to limit their showing with respect to the computations therein made to only so much of those computations as were included in Exhibit CC (Tr. 2966, line 15, to 2967, line 3).

1165. By striking from the record the testimony of [1749] Opal Smith and in excluding her offered testimony as to the practice of the plaintiff company to add water and otherwise adulterate citrus juices manufactured and sold by it and the further evidence of the witness to show actual knowledge by Winckler of such practices (offered Tr. 3083, line 8 to 3087, line 18; excluded line 22).

1166. By excluding the offered testimony of Frank Gilbert as to the practice of the plaintiff company to add water and otherwise adulterate citrus juices manufactured and sold by it, as to actual knowledge of Winckler as to these practices, as to the unsatisfactory performance by Winckler of a 1947 processing agreement (Tr. 3089, line 3 to 3091, line 11, excluded line 14).

1167. By excluding offered testimony of Rogers that the mechanical conditions of TreeSweet plant were not comparable to those of plaintiff company (Tr. 3119, line 25 to Tr. 3120, line 11).

1168. By excluding testimony of Rogers that extractors of plaintiff company did not produce single-strength orange juice of quality comparable to those used by other canners (Tr. 3124, line 12 to Tr. 3124, line 23).

1169. By striking out testimony of Rogers the underlined portion of the following answer: "Well, the citromat does not extract as much juice from a given ton of fruit of a quality of juice which would be considered one which we would use in single-strength purposes." (Tr. 3125, line 14 to Tr. 3126, line 21.)

1170. By excluding testimony of Rogers as to discussions between the witness and Winckler of reasons for replacing citromat extractors (Tr. 3126, line 5 to Tr. [1750] 3126, line 18).

1171. By excluding testimony of Rogers that citromat extractors were not used or useable in the production of first-quality orange juice (Tr. 3127, line 24, to Tr. 3128, line 12).

1172. By excluding offered testimony of Rogers as to the practice of plaintiff company to add water and other materials to orange juice and that when he recommended to Winkler installation of more effecient extracting machinery, Winckler said he woudln't do it as long as he could make up for deficiency by adding water (Tr. 3133, line 16 to Tr. 3134, line 6).

1173. By excluding testimony of Nels Warner with respect to the productive capacity of citromats as compared with other extractors in the production

of single-strength Valencia juice (Tr. 3212, line 23 to Tr. 3213, line 4).

1174. By excluding and striking from the record testimony of Nels Warner that plaintiff company was the only processor that attempted to process Valencia oranges for single-strength packing by the use of citromats (Tr. 3213, line 11 to Tr. 3213, line 18).

1175. By excluding testimony of Warner as to mechanical conditions of plaintiff company's plant during the period from 1946 to 1951, and in requiring that testimony be limited to the year 1951 (Tr. 3214, line 4 to line 13).

1176. By excluding testimony of Warner as to procedures of plaintiff company for grading and culling fruit going to extractors (Tr. 3215, line 4 to line 9).

1177. By rejecting testimony of Warner offered with respect to the inferior quality of juice produced by citromat, as to the poor quality of product produced by plaintiff [1751] company, as to the inadequacy of culling and grading and use of bad fruit, as to lack of sanitation in the plant, and as to bad physical condition of plant (Tr. 3222, line 19 to Tr. 3226, line 6).

1178. By excluding testimony offered by Templeton to corroborate testimony of Warner (Tr. 3222, line 19 to Tr. 3226, line 6).

1179. By excluding testimony of Ralph H. Higby, Chief Chemist of defendant EOP, as to knowledge of poor quality, lack of sterility and dirt in products manufactured by plaintiff company and

as to his examination of books and records of plaintiff company to determine the fact that juice was adulterated and to establish the extent of adulteration and that the adulteration and marketing of these products constituted a violation of Federal law (Tr. 3226, line 22 to Tr. 3231, line 25).

1180. By excluding the testimony of Finley offered to show the reasons which the growers had for entering into participation arrangements (Tr. 3639, line 5 to line 16).

1181. By excluding testimony of Finley offered to show certain of the reasons, beliefs, knowledge and state of mind upon which defendants in 1951 refrained from entering into a grower-participation arrangement with W/S (Tr. 3674, line 9 to 3692, line 18). [1752]

1182. By excluding testimony of Finley offered to show certain of the reasons and purposes of defendants in entering in 1951 into grower-participation arrangement with TreeSweet (Tr. 3739, lines 10 to 20).

1183. By excluding offered testimony of Regan that computations made by Hodge misconstrue the TreeSweet processing arrangement and were based upon assumptions with respect to comparability of W/S and TreeSweet which were in error and contrary to evidence appearing in the record. (Tr. 2930, line 4, to 2936, line 25; 2995, lines 7 to 24.) [1753]

12. The court erred in giving, over defendants' objections, the following instructions (Tr. 4697, line 3 to 4700, line 16):

1201. Civil 12A (Tr. 4648, lines 18 to 25).

1202. Civil 12B (Tr. 4649, lines 1 to 8).

1203. Plaintiffs' No. 2 (Tr. 4652, line 10 to 21).

1204. Plaintiffs' No. 7 (Tr. 4652, line 22 to 4653, line 8).

1205. Plaintiffs' No. 8 (Tr. 4653, lines 9 to 19).

1206. Court's K (Tr. 4654, line 23 to 4656, line 21).

1207. Court's B (Tr. 4658, line 9 to 4659, line 24).

1208. Court's Q (Tr. 4663, line 15 to 4664, line 5).

1209. Plaintiff's No. 4 (Tr. 4664, lines 7 to 11).

1210. Plaintiffs' No. 3 (Tr. 4664, lines 12 to 19).

1211. Plaintiffs' No. 5 (Tr. 4664, line 20 to 4665, line 1).

1212. Plaintiffs' No. 13 (Tr. 4666, lines 18 to 20).

1213. Plaintiffs' No. 37, Revision No. 2 (Tr. 4666, line 21, to 4668, line 4).

1214. Plaintiffs' No. 6 (Tr. 4669, line 13 to 4670, line 3).

1215. Plaintiffs' No. 32 (Tr. 4670, lines 4 to 6).

1216. Plaintiffs' No. 33 (Tr. 4670, lines 16 to 21).

1217. Court's N (Tr. 4671, lines 1 to 3).

1218. Plaintiffs' No. 28 (Tr. 4671, lines 4 to 8).

1219. Plaintiff's No. 29 (Tr. 4671, lines 9 to 17).

1220. Plaintiff's No. 12 (Tr. 4671, line 18 to 4672, line 3).

1221. Plaintiffs' No. 27 (Tr. 4672, lines 4 to 24).

1222. Plaintiffs' No. 34 (Tr. 4672, line 25 to 4673, line 17).

1223. Plaintiffs' No. 35 (Tr. 4673, line 18 to 4674, line 13).

1224. Plaintiff's No. 36 (Tr. 4674, lines 14 to 21, and 4674, line 25 to 4675, line 17). [1754]

1225. Defendants' No. 16a, as modified (Tr. 4675, lines 18 to 24).

1226. Plaintiffs' No. 38 (Tr. 4675, line 25, to 4676, line 11).

1227. Plaintiffs' No. 30 (Tr. 4676, lines 12 to 23).

1228. Plaintiffs' No. 15 (Tr. 4677, lines 3 to 6).

1229. Plaintiffs' No. 19, Revision No. 1 (Tr. 4677, lines 7 to 23, and 4678, lines 2 to 7).

1230. Court's P (Tr. 4679, lines 1 to 4).

1231. Defendants' No. 7, Revision No. 1 (Tr. 4679, line 5, to 4680, line 6).

1232. Defendants' No. 17a, as modified (Tr. 4680, line 7, to 4681, line 3).

1233. Defendants' No. 9A, first Revision, as modified (Tr. 4681, lines 7 to 17).

1234. Court's R (Tr. 4681, line 20, to 4685, line 17 (includes interpolations)).

1235. Court's D (Tr. 4685, line 18, to 4686, line 7).

1236. Court's E (Tr. 4687, lines 1 to 8).

1237. Plaintiffs' No. 23, Revision No. 1 (Tr. 4688, line 22, to 4689, line 10).

The Court also erred in repeating to the jury, after it had retired, the substance of Court's Instruction B (Tr. 4717, line 10, to 4719, line 23) over defendants' objections (Tr. 4720, lines 8 to [1755] 22).

13. The Court erred in failing and refusing to give, either in form or substance, the following in-

structions requested by defendants (Tr. 4697, line 3 to 4700, line 16):

1301. Defendants' Nos. A and B.

1302. Defendants' No. 2.

1303. Defendants' No. 4, and failing this, defendants' No. 4 as modified (Tr. 4033, line 17, to 4034, line 11).

1304. Defendants' Nos. 5 and 6.

1305. Defendants' No. 7, and failing this, defendants' No. 7 as modified (Tr. 4060, line 25, to 4068, line 15).

1306. Defendants' No. 8, and failing this, defendants' No. 8 as modified (Tr. 4083, line 4, to 4084, line 13).

1307. Defendants' proposed (unnumbered) instruction that there could be no verdict for plaintiff unless the jury found that the acts of defendants complained of directly and necessarily excluded plaintiff as a competitor, or that the acts complained of were performed with the specific intent of excluding plaintiff as a competitor (Tr. 3523, lines 10, to 18, 4085, lines 10 to 21).

1308. Defendants' Nos. 9, 9a, 9A (first revision), 10, 11, 12, 13, 14, 14a, 14b.

1309. Defendants' No. 15, and failing this, defendants' No. 15 as modified (Tr. 4103, lines 1 to 14).

1310. Defendants' No. 16, and failing this, defendants' No. 16 as modied (Tr. 4128, line 9, to 4129, line 4).

1311. Defendants' Nos. 16a and 16b.

1312. Defendants' No. 17a, and failing this, de-

fendants' No. 17a as modified (Tr. 4164, lines 10 to 19).

1313. Defendants' No. 18, and failing this, defendants' No. 18 as modified (Tr. 4170, line 15, to 4172, line 25).

1314. Defendants' Nos. 20 to 25, both inclusive, and failing this, defendants' Nos. 20 to 25, both inclusive, as modified (Tr. 4173, line 21, to 4174, line 4).

1315. Defendants' Nos. 25b and 25d. [1756]

1316. Defendants' No. 25-1, and failing this, defendants' No. 25-1 as modified (Tr. 4207, lines 1 to 23; 4210, line 24, to 4211, line 6).

1317. Defendants' No. 34, and failing this, defendants' No. 34 as modified (Tr. 4182, line 9, to 4183, line 2).

1318. Defendants' No. 34a, and failing this, defendants' No. 34a as modified (Tr. 4249, lines 11 to 12).

1319. Defendants' Nos. 35, 36a, 39, 41 and 43.

1320. Defendants' No. 44, and failing this, defendants' No. 44 as modified (Tr. 4284, line 24, to 4286, line 3).

1321. Defendants' No. 45.

14. The Court erred in denying the "motion of defendants for leave to amend their answers to the amended complaint" (Tr. 3372, lines 18 and 19; 3377, line 22).

15. The Court erred in allowing plaintiffs' "motion to amend amended complaint to conform to the

evidence" (Tr. 3477, lines 6 and 7); and in allowing plaintiffs' motion further to amend the second amended complaint (Tr. 4205, line 11 to 4206, line 6). [1757]

16. Further errors in law were committed at the trial and there were irregularities in the proceedings and abuses of discretion by which defendants were prevented from having a fair trial, which errors, irregularities and abuses of discretion were as follows:

1601. The Court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in the following respects:

(a) By participating in and assisting plaintiffs in the examination of witnesses and permitting and inviting plaintiffs' witnesses to make argumentative, self-serving and explanatory statements as follows:

The witness Kelly: Tr. 356, line 14 to 357, line 4.

The witness Finley: Tr. 416, line 1 to 417, line 17; 449, line 24 to 452, line 22; 463, line 9 to 464, line 4; 587, line 23 to 589, line 4; 620, lines 5 to 25; 639, lines 8 to 10; 645, line 24 to 669, line 3; 693, line 20 to 699, line 2.

The witness Winckler: Tr. 852, line 8 to 854, line 10; 887, lines 1 to 15; 888, lines 10 to 24; 911, lines 5 to 11; 918, lines 17 to 22; 935, lines 7 to 15; 943, lines to 14; 1279, line 19 to 1281, line 11; 1754, line 1 to 1756, line 19. [1758]

The witness Browne: Tr. 1519, lines 17 to 25; 1534, lines 3 to 16.

The witness Ward: Tr. 1720, lines 1 to 24; 1746, lines 1 to 10.

The witness Hodge: Tr. 1788, line 6 to 1790, line 1; 1790, line 12 to 1800, line 10; 1800, line 24 to 1801, line 7; 1801, line 23 to 1802, line 7; 1807, line 20 to 1809, line 20; 1810, lines 7 to 14; 1813, line 14 to 1814, line 4; 1815, line 12 to 1817, line 16; 1819, line 13 to 1822, line 14; 1823, line 18 to 1824, line 5; 1827, line 3 to 1828, line 6; 1830, line 1 to 1832, line 16; 1840, lines 5 to 24; 1842, line 23 to 1843, line 14; 1858, lines 1 to 14; 1860, lines 8 to 17; 1867, line 11 to 1888, line 13; 2172, line 25; 2179, line 17; 1846, line 24 to 1848, line 14; 1861, line 20 to 1862, line 10.

(b) By permitting and inviting plaintiffs' witnesses while on cross-examination to evade questions, make unresponsive answers, and volunteer argumentative, self-serving and explanatory statements as follows:

The witness Winckler: Tr. 1023, lines 6 to 25; 1049, line 24 to 1051, line 5; 1065, lines 3 to 23; 1067, line 12 to 1068, line 20; 1096, line 4; 1095, line 21 to 1097, line 5; 1107, line 5 to 1108, line 13; [1759] 1112, line 13 to 1113, line 22; 1149, line 11 to 1150, line 17; 1473, lines 11 to 14; 1021, lines 3 to 6; 1023, lines 6 to 24; 1049, line 17 to 1051, line 5; 1055, lines 12 to 15; 1065, lines 3 to 21; 1067, line 12 to 1068, line 20; 1279, line 19 to 1289, line 11.

The witness Hodge: Tr. 1986, line 1 to 1988, line 5; 2097, line 20; 2106, line 10.

(c) By restataing, interpreting and emphasizing before the jury certain testimony of witnesses as follows:

The witness Kelly: Tr. 356, line 14 to 357, line 4.

The witness Finley: Tr. 416, line 1 to 417, line 17; 449, line 24 to 452, line 22; 463, line 9 to 464, line 4; 645, line 24 to 669, line 3; 646, line 16 to 649, line 2.

The witness Browne: Tr. 1519, lines 17 to 25; 1534, lines 3 to 16.

The witness Ward: Tr. 1720, lines 1 to 24; 1746, lines 1 to 10.

The witness Hodge: Tr. 1788, line 6 to 1790, line 1; 1790, line 12 to 1800, line 10; 1801, line 3 to 1802, line 7; 1807, line 20 to 1809, line 14; 1810, line 14; 1813, line 14 to 1814, line 4; 1815, line 12 to 1817, line 16; 1819, line 13 to 1822, line 14; 1823, line 18 to 1824, line 5; 1827, line 3 to 1828, line 6; 1830, line 1 to 1832, line 16; 1840, lines 5 to 24; 1843, lines 1 to 14; 1858, [1760] lines 1 to 14; 1860, lines 8 to 17; 1867, line 11 to 1888, line 13; 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 4; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to 1967, line 7; 1989, lines 12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1998, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2018, line 1 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2144, lines 2 to 6; 2147, line 21 to 2149, line 11; 2180, line 20 to 2181, line 3; 2190, line 5; 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20; 257, line 3 to 2261, line 2; 2263, line 4 to 2264, line 5.

(d) By interfering with the right of defendants to uninterrupted cross-examination and conducting

interrogation during the cross-examination of plaintiffs' witnesses so as to assist plaintiffs and prejudice defendants as follows:

The witness Winckler: Tr. 1023, lines 6 to 18; 1049, line 24 to 1051, line 5; 1065, lines 3 to 23; 1067, line 12 to 1068, line 20; 1072, line 15 to 1077, line 24; 1096, line 5 to 1097, line 5; 1107, line 5 to 1108, line 13; 1109, line 13 to 1111, line 8; 1112, line 13 to 1113, line 22; 1116, line 10 to 1137, line 12; [1761] 1149, line 11 to 1150, line 17; 1253, line 1 to 1261, line 19; 1279, line 19 to 1281, line 11; 1479, lines 1 to 17.

The witness Hodge: Tr. 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 6; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to 1967, line 7; 1986, line 1 to 1988, line 5; 1989, lines 12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1998, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2018, line 1 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2097, line 20 to 2106, line 10; 2144, lines 2 to 6; 2147, line 21; 2149, line 11; 2180, line 15 to 2181, line 3; 2190, line 5 to 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20; 2257, line 3 to 2261, line 2; 2262, line 4 to 2264, line 5.

(e) By interposing rulings without objections having been made as follows:

Tr. 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 4; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to [1762] 1967, line 7; 1986, line 1 to 1988, line 5; 1989, lines

12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1988, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2017, line 13 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2097, line 20 to 2098, line 12; 2106, lines 7 to 10; 2144, lines 2 to 6; 2147, line 21 to 2149, line 11; 2180, line 20 to 2181, line 3; 2190, line 5 to 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20, 2257, line 3 to 2261, line 2; 2262, line 4 to 2264, line 3. [1763]

(f) By engaging in colloquies and arguments and discussing theories and contentions of the parties in the presence of the jury as follows:

Tr. 646, lines 6 to 8; 991, line 14 to 994, line 16; 1098, line 25 to 1101, line 6; 1269, line 16 to 1274, line 7; 1487, line 10 to 1489, line 9; 2399, line 7 to 2401, line 11; 2410, line 5 to 2413, line 20; 2419, lines 11 to 19; 2431, line 15 to 2432, line 19; 2435, lines 6 to 9; 2486, lines 14 to 25; 2660, lines 1 to 25; 2684, line 4 to 2689, line 25; 2705, line 4 to 2708, line 6; 2760, line 10 to 2761, line 5; 2988, line 24 to 2990, line 14; 3665, line 22 to 3667, line 17.

(g) By impugning in the presence of the jury the propriety of the conduct of counsel for the defendants as follows:

Tr. 797, line 17 to 798, line 20; 1007, line 21 to 1008, line 2; 1116, line 10 to 1137, line 12; 1235, line 6 to 1239, line 1; 1253, line 1 to 1255, line 24; 1487, line 10 to 1489, line 9; 2392, line 8 to 2395, line 6; 2399, line 7 to 2401, line 11; 2419, lines 11 to 19; 2431, line 15 to 2432, line 19; 2684, line 4 to 2689, line 25; 2691, line 5 to 2694, line 5; 2764, lines 14 to

21; 2876, line 21 to 2879, line 15; 3088, lines 4 to 9; 3641, line 20 to 3642, line 3; [1764] 3655, line 22 to 3667, line 17; 3740, lines 1 to 16.

(h) By cross-examining defense witnesses as follows:

The witness Lynch: Tr. 2406, line 20 to 2407, line 15; 2428, line 9 to 2429, line 22; 2664, line 9 to 2671, line 18; 2808, line 20 to 2809, line 15; 2812, line 13 to 2814, line 25.

The witness Walker: Tr. 2635, line 25 to 2637, line 1.

The witness Swayne: Tr. 2745, line 23, to 2747, line 4.

(i) By giving undue emphasis to limitations upon the evidentiary purposes of the defendants' evidence as follows:

Tr. 1653, line 1 to 1660, line 10; 1667, lines 6 to 20; 1670, line 8 to 1674, line 11; 1681, lines 1 to 4; 1682, line 17 to 1683, line 2; 3593, line 13 to 3597, line 6.

(j) By interrupting the direct examination of defendants' witnesses and making comments on their testimony and on the method of presentation of evidence as follows:

Tr. 2392, line 8 to 2395, line 6; 2396, line 11 to line 23; 2399, line 7 to 2401, line 13; 2410, line 5 to 2414, line 9; 2419, line 5 to line 19; [1765] 2428, line 9 to 2429, line 23; 2431, line 15 to 2432, line 19; 2435, lines 5 to 19; 2486, line 14 to 2487, line 4; 2664, line 9 to 2671, line 18; 2686, line 9; 2689, line 24; 2691, line 5 to 2694, line 5; 2751, line 5 to 2752, line 12; 2758, line 14 to 2762, line 21; 2764, lines 14 to 21;

2868, line 8 to 2874, line 4; 2876, line 18 to 2879, line 15; 2886, line 2 to line 16; 2988, line 24 to 2991, line 24; 2996, lines 8 to 14; 3120, lines 11 and 12; 3122, line 15 to 3123, line 14; 3126, lines 18 to 22; 3128, lines 12 to 17; 3192, lines 1 to 3; 3665, line 22 to 3667, line 17. [1766]

1602. The Court erred and materially prejudiced defendants by stating to the jury while giving instructions, "If I am wrong in this, the defendants aren't hurt, because then they have error."

1603. By denying motions of defendants for access to and discovery of documents in possession of plaintiffs (Tr. 1235, line 6 to 1239, line 1; 2445, line 1 to 2456, line 1).

1604. The Court erred by imposing limitations upon the evidentiary purposes for which certain exhibits offered by defendants were received, and by instructing the jury as to the limitations erroneously imposed:

Exhibits Z, AA, AF, AG, AH, AI, AJ (Tr. 1565, line 5 to 1588A, line 24; 1653, line 5 to 1660, line 10).

Exhibits CS, CA, CB, CY, CZ, DC, DD, DF, DG, DH, DI, DJ, DL, DM, DN, DO, DQ, DR, DS, DU, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EM, EN, EP, ES and FD (Tr. 3593, line 4 to 3597, line 9).

17. The Court erred by overruling the motion of defendants for judgment in accordance with defendants' motion for a directed verdict at the close of all of the evidence in the trial of the above-entitled action. (Tr. 4765, lines 13 and 14.)

18. The Court erred by ruling that the sum of $2,500 paid by TreeSweet to plaintiffs should not be credited against the damages assessed in the verdict and in ruling that it should be credited only against the threefold damages (Tr. 4773, lines 12 to 16).

19. The Court erred in allowing to plaintiffs attorney's fees unreasonable and excessive in amount [1767] and not supported by the law or the evidence.

Wherefore, defendants jointly and severally move the Court to set aside the verdict and judgment herein and grant a new trial of the above-entitled cause; and further move the Court to stay the execution of any and all proceedings to enforce said judgment pending disposition of the aforesaid motion for new trial.

This motion is based upon the above and foregoing and upon the records and files herein and upon the Memorandum of Points and Authorities hereto attached.

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc. and The Exchange Orange Products Company.

[Endorsed]: Filed March 14, 1956. [1768]

[Title of District Court and Cause.]

No. 13788-C

ORDER

A motion to set aside the verdict and the judgment herein, and for a new trial having been made by the defendants and the court having inspected the same; and the court having recalled that in certain instances a continuing objection was allowed to the defendants; but it further appearing that numerous matters and grounds assigned by the defendants are not supported by any objection in the record;

Now Therefore, It Is Ordered, that the defendants specify in writing and file on or before March 22, 1956, a document referring to their grounds by the numbers used in the said motion and listing thereafter the place in the record by page and line where the objection, if any, appeared; and if no objection was made, so specifying.

It Is Further Ordered, for the convenience [1772] of the court's calendar, that the said motion to set aside the verdict and judgment, and for a new trial, be heard at 10 a.m. instead of 2 p.m. on March 26, 1956.

Dated: March 15, 1956.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed March 15, 1956. [1773]

[Title of District Court and Cause.]

No. 13788-C

SPECIFICATION OF OBJECTIONS, PURSUANT TO ORDER OF MARCH 15, 1956.

Come now defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company, and pursuant to the order of this court made March 15, 1956, do hereby specify the grounds of their objections and wherein in the record such objections were made in those instances where in defendants' Motion to Set Aside the Verdict and for Judgment Herein and for a New Trial such grounds and record references do not appear.

I.

Defendants understand that such specification is not [1793] required for the grounds specified in Points 1 to 9, inc., 11 to 15 inc., and 17 to 19 inc. of their Motion for New Trial under the said order. With respect to the other points defendants will hereinafter specify the grounds of objection and indicate the record reference where the objection appeared, specifying where there was no formal objection made. This will be done by the numbers used in defendants' Motion for New Trial. Omitted numbers will indicate that the Motion for New Trial does specify the grounds and the record.

II.

Point 10 of Motion for New Trial:

The court erred in receiving evidence over the objections of defendants.

1001. Plaintiff's Exhibit 4. Grounds: Immaterial and irrelevant.

1005. Plaintiff's Exhibit 25. Grounds: In addition to other references: Continuing objection on the grounds of the statute of limitations, which objection was permitted by the court to be a continuing objection. (Tr. 393, line 21 to Tr. 394, line 8.)

1006. Plaintiff's Exhibit 49. Defendants were granted a continuing objection to the entire transaction of the sale of the carload of juice on the grounds of the statute of limitations. (Tr. 989, line 1 to Tr. 990, line 4, inc.)

1009. Plaintiff's Exhibit 66-A. In admitting this exhibit which was a revision of plaintiff's exhibit 66, the court overruled all objections of defendants to Exhibit 66. However, on re-examining the transcript we find no formal objection was made by defendants to Exhibit 66. (Tr. 1864, line 3 to Tr. 1883, line 22.)

1010. Plaintiff's Exhibit 69-A. In admitting this exhibit which was a revision of plaintiff's Exhibit 69, the court overruled all objections of defendants to Exhibit 69. On re-examining the transcript we find objections were made by defendants [1794] to Exhibit 69 although no formal objection was made, and it is not altogether clear that Exhibit 69 was

received in evidence. (Tr. 2166, line 5 to Tr. 2204, line 5; Tr. 2267, line 9 to Tr. 2270, line 4.)

1018. Grounds of defendants' objection—immateriality.

1019. Grounds of defendants' objection—Objection that question based upon assumed facts not in evidence and could not be used in establishing damages, and question immaterial and irrelevant.

1020. Grounds of defendants' objection—Hearsay and prima facie case of conspiracy not shown.

1021. Grounds of defendants' objection—Not proper subject for opinion evidence, calls for a conclusion of the witness, argumentative, and invades the province of the jury. (Tr. 1006, line 12. to Tr. 1008, line 2.)

1022. Grounds of defendants' objection—That witness was testifying to "second hand knowledge" and answers were argumentative and conclusions.

1023. Grounds of defendants' objection—That the order in the Chapter XI bankruptcy proceedings (Ex. 84 and 84A) would have to speak for itself and witness Hodge could not construe the order. (Tr. 3835, line 13 to Tr. 3838, line 22.)

1024. Grounds of defendants' objection—That testimony of Hodge was argumentative and that Hodge testimony was interpreting testimony of witness Finley, a jury function.

III.

Point 16 of Motion for New Trial:

The errors, irregularities and abuses of discretion referred to in paragraph 16 of the motion for new

trial, that is, that the Court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in certain [1795] respects, were not objected to during the trial upon the grounds urged in said paragraph 16, except in the following instances:

1601 (a). Winckler having answered "no" to the question on direct examination whether $3.53 included all of the cost items in producing a case of 12/46s, was allowed to explain his answer over defendants' objection that the question had been answered. (Tr. 935, lines 7 to 15.)

1601 (a). Winckler was allowed on redirect examination to explain at length what he meant when he testified on direct examination that he had no knowledge of any broker or customer dissatisfaction at all except on products which contained navel juice or was pure navel juice, over defendants' objection that there was no ambiguity in Winckler's answer that would justify an explanation. (Tr. 1754, line 1, to 1756, line 19.)

1601 (a). Hodge was permitted to state that it was very obvious why plaintiff lost $152,000 in the first six months of the year beginning February 1, 1951, over defendants' objection that Hodge was not qualified to give his opinion. (Tr. 1846, line 24, to 1848, line 14.)

1601 (a). Hodge was permitted to give and explain why plaintiff lost $184,000 in the year ending January 31, 1952, over defendants' objection that no foundation was laid for such opinion evidence from Hodge. (Tr. 1861, line 20, to 1862, line 10.)

1601 (b). Winckler was allowed to commence a dissertation on citrus tonnage, despite the defendants' request that the Court admonish the witness to answer questions. (Tr. 1021, lines 3-6.)

1601 (b) and (d). Winckler was permitted, over defendants' resistance, to give a long explanation about complaints on navel juice products, although defendants were asking him simply to name the products on which complaints had been received. (Tr. 1049, line 17, to 1051, line 5.) [1796]

1601 (b) and (d). Winckler was permitted to explain an answer, although defendants suggested he do so on redirect, the Court saying he may explain it now, since it is customary for a witness to explain his answer at the time. (Tr. 1065, lines 3-21.)

1601 (b) and (d). Winckler was permitted to state his realization that plaintiff's plant was worth substantially more than it was sold for in 1949, despite defendants' motion to strike Winckler's realization as being no proper part of his explanation which was denied, Winckler being allowed to continue with his explanation. (Tr. 1095, line 21, to 1097, line 5.)

1601 (b) and (d). Winckler was permitted, despite defendants' efforts to obtain a "yes" or "no" answer, to give a lengthy explanation concerning the write-up by appraisal of plaintiff's property after it was re-acquired in 1951. (Tr. 1107, line 5, to 1108, line 13.)

1601 (b) and (d). Winckler was allowed to explain an answer of "no" to a question on cross-

examination concerning the date of an appraisal, despite defendants' remonstrance that no question was pending, the Court commenting, "He may explain it counsel. Everything in the world is not black or white." (Tr. 1112, line 13, to 1113, line 22.)

1601 (f). The Court overruled defendants' request that the jury be instructed to disregard the plaintiff's and the Court's statements as to plaintiff's contentions and theories with respect to the sale by defendant EOP to plaintiff of a carload of orange juice in October, 1951. (Tr. 991, line 14, to 994, line 16.)

1601 (j). The witness Ned Lewis having testified on direct examination that plaintiff's supposed inability to obtain fruit had nothing to do with his decision not to invest in plaintiff's business, contrary to Winckler's earlier testimony, and the plaintiff having offered as part of cross-examination a letter of Mr. Lewis, and the defendants having objected to it as being [1797] immaterial, the Court overruled the objection with the comment that the letter was not much more pertinent than the witness' testimony on direct. When defendants objected to the Court's comment as being prejudicial, the Court instructed the jury to disregard his comments about the letter. (Tr. 3192, line 1, to 3194, line 18.)

IV.

While it is the general rule that a party who wishes to complain on appeal of the conduct of the trial court must have objected to the conduct of the

court during the trial, there are exceptions to this rule as illustrated in the cases cited in the defendants' Memorandum of Points and Authorities in support of their Motion for New Trial filed March 16, 1956, and in the attached Memorandum of Points and Authorities.

V.

Defendants have discovered certain mistakes in the transcript references in this Motion for New Trial, and invite the Court's attention to the following corrections, and ask that their Motion for New Trial be considered to be amended accordingly:

1. Page 9, line 15: after "line 25," delete the semicolon and the number "645," and insert "to 646."

2. Page 10, line 1: Tr. 3825 should be Tr. 3835.

3. Page 19, line 2: Transcript reference should be Tr. 2111, line 7, to 2112, line 21.

4. Page 19, line 10: delete words "and striking."

5. Page 19, line 14: transcript reference should be Tr. 2430, line 15, to 2431, line 15.

6. Page 28, line 24: 669 should be 649.

7. Page 28, line 25: substitute Clark for Winckler.

8. Page 28, line 26; insert "The witness Winckler" before the number 887. [1798]

9. Page 29, line 9: after "line 3," remove the semicolon and insert "to."

10. Page 29, line 12: after "line 12," remove the semicolon and insert "to."

11. Page 29, line 14: after "line 18," remove the semicolon and insert "to"; the same after "line 3."

12. Page 29, line 19: after "line 25," remove the semicolon and insert "to."

13. Page 29, lines 28 to 31: delete lines 28-31, through "line 4."

14. Page 30, line 2: delete "1473, lines 11 to 14."

15. Page 30, line 4: delete "1055, lines 12 to 15."

16. Page 30, line 5: change 1289 to 1281.

17. Page 30, line 8: after "line 20" remove the semicolon and insert "to."

18. Page 31, lines 4-5: delete "1943, line 10, to 1945, line 4."

19. Page 32, line 7: delete "1943, line 10, to 1945, line 6."

20. Page 32, line 18: after "line 21" delete the semicolon and insert "to."

21. Page 32, lines 26-28: delete lines 26-28 through "line 4."

22. Page 33, lines 6-8: delete lines 6-8 through "line 12."

23. Page 33, lines 12-13: delete "2239, line 22 to 2241, line 1; 2254, line 12 to 20."

24. Page 33, line 15: add "3088, lines 4-9" (striking testimony of Opal Smith on Court's own motion).

25. Page 34, line 8: 1497 should be 1487.

26. Page 34, line 22: 116 should be 1116.

27. Page 36, lines 14-15: reference should be Tr. 3192, line 1 to 3194, line 18. [1799]

28. Page 37, line 4: insert "(Tr. 4685, lines 12-13)."

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc. and The Exchange Orange Products Company.

Memorandum of Points and Authorities

In re Golden's Estate, 4 Cal. (2d) 300 (1934); 48 Pac. (2d) 962;

In re Etzel v. Rosenbloom,
83 Cal. App. (2d) 758 (1948); 189 Pac. (2d) 848;

Podlasky v. Price,
87 Call. App. (2d) 151, 164, 171 (1948); 196 Pac. (2d) 608.

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 22, 1956. [1801]

[Title of District Court and Cause.]

No. 13788-C

MOTION OF DEFENDANTS FOR LEAVE TO AMEND THEIR MOTION FOR A NEW TRIAL BY ADDING THERETO A PARAGRAPH 20

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant, The Exchange Orange Products Company, a corporation, and jointly and severally move the Court for leave to amend their Motion for New Trial filed herein on March 14, 1956, by adding thereto on page 38 the following paragraph:

"20. The Court erred in interrupting the closing argument of counsel for the defendants (Tr. 4592, line 23, to 4593, line 17) and stating [1804] that Defendants' Exhibit AV had been received for impeachment purposes only, and limiting the manner in which counsel could argue this exhibit to the jury."

This motion is based upon the above and foregoing and upon the records and files herein and upon the Court's ruling receiving Defendants' Exhibit AV in evidence generally and without objection of the plaintiff. (Tr. 1703, lines 5-16.)

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,

THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER.

Affidavit of Service by Mail attached.

[Endoresd]: Filed March 26, 1956. [1805]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
MARCH 26, 1956

Present: Hon. James M. Carter, District Judge;

Counsel for Plaintiffs Wm. C. Dixon for Plf and Intervening Plaintiff;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Ross C. Fisher and Att'y Frank F. Fowle for def't Sunkist Growers, Inc., and Exchange Orange Products Co.

Proceedings:

For hearing motion of defendants Sunkist Growers, Inc., and The Exchange Orange Products Co., filed March 14, 1956, to set aside the verdict and judgment and for new trial.

Attorney Fisher presents a motion to amend its motion for new trial, and It Is Ordered that said motion to amend is granted, and it is deemed that the said motion to amend be an amendment to the motion for a new trial.

Attorney Fisher argues in support of the motion for the new trial.

At 12:05 p.m. court recesses to 3:20 p.m.

At 4:15 p.m. court reconvenes herein, and all being present as before,

Attorney Fisher argues further; Attorney Fowle argues in support of motion; and Attorney Dixon argues in opposition;

It Is Ordered that cause as to said motion of defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. to set aside the verdict and judgment and for new trial stand Submitted.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1808]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
MARCH 30, 1956

Present: Hon. James M. Carter, District Judge;

Counsel for Plaintiff and Intervening Plaintiff: William C. Dixon;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Ross C. Fisher for Def'ts Sunkist Growers, Inc., and Exchange Orange Products Co.

Proceedings:

The Court having taken under submission the motion of defendants to set aside the judgment and verdict and for a new trial, and having considered said motion.

It Is Ordered that the said motion be, and hereby is denied. (Counsel not present at time of this ruling.)

Later, at 2 p.m., court convenes herein, Samuel Goldstein, Reporter, William C. Dixon, counsel for plaintiff and intervening plaintiff, and Harry M. Irwin, counsel for intervening plaintiff, and Ross C. Fisher, counsel for defendants Sunkist Growers, Inc., and Exchange Orange Products Co., being present;

Defendants move to fix supersedeas bond on appeal (to be taken) in the sum of $2,000,000.00, including cost bond on appeal.

Attorney Dixon makes a statement in opposition, in behalf of plaintiffs, as to the amount of bond, and requests it be fixed at $2,300,000.00.

It Is Ordered that defendants' motion is granted and supersedeas bond is fixed in the sum of $2,000,000.00, including costs on appeal, and

It Is Further Ordered that said bond may be by approved corporate sureties, or by deposit of government bonds as provided in 6 U. S. Code 15; and

It Is Further Ordered that defendants are granted a stay of execution on the judgment herein for a period of ten days from and after the filing of their notice of appeal, and that the supersedeas bond be posted within said ten-day period.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1809]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT (UNDER RULE 73b)

Notice Is Hereby Given that Sunkist Growers, Inc., a corporation, and The Exchange Orange

Products Company, a corporation, defendants above named, hereby jointly and severally appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 5, 1956, and from the whole thereof, and from the order of this Court entered on March 30, 1956, denying said defendants' motion to set aside the [1821] verdict herein and the judgment entered herein and for a new trial.

ROSS C. FISHER,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 27, 1956. [1822]

[Title of District Court and Cause.]

No. 13788-C

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

This matter having this date come on for hearing before the undersigned, judge of the above-entitled court, upon the motion of Sunkist Growers, Inc.,

and The Exchange Orange Products Company, defendants-appellants above named, for an order extending the time for filing the record on appeal and docketing the appeal of the defendants-appellants, and the court having determined that notice [1834] of the hearing of said motion is not necessary;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the time for filing the record on appeal and docketing the appeal of Sunkist Growers, Inc., and The Exchange Orange Products Company, defendants-appellants, be, and the same is hereby, extended to and including July 26, 1956.

Done this 24 day of May, 1956.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed May 24, 1956. [1835]

In the United States District Court, Southern District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

and

RONALD WALKER, as Trustee in Bankruptcy of Winckler & Smith Citrus Products Co.,

Intervening Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation; EXCHANGE ORANGE PRODUCTS CO., a Corporation; EXCHANGE LEMON PRODUCTS CO., a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTERS' TRANSCRIPT OF PROCEEDINGS

(In Chambers)

Wednesday, November 24, 1954

Appearances:

For Intervening Plaintiff Ronald Walker:
HARRY M. IRWIN, ESQ., and
WILLIAM C. DIXON, ESQ.

For Defendant Sunkist Growers, Inc., and Exchange Orange Products Co.:
FARRAND & FARRAND, By
ROSS C. FISHER, ESQ.

For Defendant Exchange Lemon Products Co.:
CLAYSON, STARK & ROTHROCK, By
MELVILLE WILLAMS, ESQ.

The Court: This is Winckler & Smith v. Sunkist, No. 13788, and is part of our pretrial procedures. [3*]

* * *

Accordingly, if you have a civil conspiracy and one overt act is done, it is true all the defendants who conspired may be responsible for that act, but the injury is the act that is done and not the conspiring. So that distinction has to be followed through on down the line.

Now, in going over this Complaint, with all due respect to our learned colleague who is not present, it is not an artful complaint. From what little I know of antitrust laws, and that is not very much, I think I could probably draw a better complaint.

Now, probably our colleague could have, too, if some of these matters had been pointed out to him. But we are forced down to the question of what the defendants did, as shown in this Complaint.

There was just the one complaint. There was no amendment, was there?

Mr. Williams: That is right.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Fisher: That is right.

The Court: So we look to overt acts that are set forth on page 9 of the Complaint, Paragraph III of the so-called specifications, and it will be noted there in the very first paragraph of it it says, "* * * the said defendants contracted, combined and conspired in such manner as to tend to [6] eliminate plaintiff from the canned citrus fruit juice market and particularly," and so forth.

I have already commented on the word "contracted." Looking at that part of the case that might concern the contracting, that might be sufficient.

But going back again to the "combined and conspired" we look further, and there are listed (a) to (f) on page 10.

Well, a refusal to sell doesn't take us very far. And then we come to (b), that "Defendants combined, agree and undertook, directly and indirectly, to have the defendants TreeSweet, E.O.P. and E.L.P. purchase by-product fruit for defendant Sunkist * * *"

And then there follows the language, "* * * so that said defendants could market canned citrus fruit juice and particularly single-strength orange juice at a price which plaintiff could not possibly meet."

It seems to me that that paragraph comes nearest to stating the overt acts or the acts of the defendants, but it still lacks a lot.

You have to interpret the word "undertook" as meaning seeing to it that something was done, and that it was in fact done.

And the words "so that said defendants could market" would give some support to that, namely, an indication of what was done. But it doesn't seem to me that in this case, [7] with the amount of time it will take to try it, and the fact that we want a final determination, it doesn't seem to me that that is a sufficient allegation of overt acts or damage done.

Now, I may be wrong, but I don't see any reason why this Complaint can't be amended now. I don't see that the statute of limitations enters into this picture at all, if the real issue in the case is, as I contemplate it is, namely, this:

That here was Sunkist occupying a monopolistic position but doing so legally. And had it stopped there there could have been no complaint.

It then enters into contracts with competitors, which are advantageous to Sunkist and the competitors, and are disadvantageous to other people in the industry.

Now, those contracts, I understand, continued on to within a period within the statute of limitations. Is that right?

Mr. Dixon: That is correct.

The Court: In other words, those contracts didn't terminate back in August of '51.

Mr. Fisher: Yes, it terminated. The delivery of fruit under the contracts, I would imagine, terminated probably by the 1st of November. I don't know exactly.

Mr. Dixon: I think that is probably true, Judge, but the purchases of the juice canned thereunder or

processed by [8] the defendants under that contract continued on until the inventory built up by the processing was exhausted by the purchases made by the defendants from Sunkist.

Mr. Williams: I assume that is true, but I am not sure. I think it probably was true.

Mr. Fisher: I would imagine there would be some purchase of the end product after the first of 1952.

Mr. Dixon: Yes.

Mr. Fisher: I am not sure of that.

The Court: That brings us then under that theory of the case which is the major theory of the case, looked at from the conspiracy standpoint, of what were the acts done that caused the injury, or what were the overt acts?

I don't like this word "overt" acts in a civil situation. These cases that I read point out that each time an act is done the statute starts to run again. Therefore, you can't say that when the contracts were entered into that was the sole act. As a matter of fact, if Sunkist and competitors had only entered the contracts and done nothing more, then the contracts would never have been carried out and there conceivably could have been no injury. It again would be similar to the conspiracy without the act.

What were the acts done? The acts done were entering the contracts, doing the various things called for by the contracts, processing the fruit and then finally putting the [9] manufactured product out on

the market at a resulting price which put the squeeze on other competitors in the business.

If that is true, I don't see any reason why this Complaint can't be amended, and be within the statute, to allege the thing that is really in issue in this case, because, as we said before, if this were only a Robinson-Patman Act violation we wouldn't be here. If there is any merit to the other theory, then we are definitely in court to find out whether it holds up.

It took me a little while to get pounded into my thick head what Mr. Williams was talking about on this matter of the injury, and I think I finally agree that I have to twice subdivide (b) there on page 10 and give it a very broad construction to add (f) that constitutes the overt acts or the acts that were done that caused the injury. [10]

* * *

One other matter where I had a little trouble keeping company with you was on page 13 of your brief. You say, "What is the unreasonable restraint of trade injuring the public?"

Now you are talking about first cause of action. And [12] you say, "If it is merely a tendency to eliminate plaintiff from the canned single-strength juice market, which is what the Complaint alleges, only a private injury to plaintiff is involved."

You cite the Emick Motors Corporation case and Wilder Manufacturing Company case.

There is no question but what, if only a private injury to the plaintiff is involved and no public

injury is involved, there is no case. And there is language in these cases backing you up on that, and there is no dispute about that. These cases are not authority for the fact that on a situation such as contended for by plaintiff there could not be a public injury.

In other words, assume the Complaint alleges the monopolistic position of Sunkist, the contracts with competitors, the impact on interstate commerce. You then have your public injury.

Then you next have your problem of whether there is a causal relation between any damage suffered to the plaintiff and the wrongful act of the defendants.

I don't have any doubt in my mind but what there either has been or can be properly alleged the public as well as a private injury under 1 and 2 of the Sherman Act. [13]

* * *

Mr. Williams: I have some general comments on the Robinson-Patman point. I suggest that we don't try to decide it today; that it really goes to the merits, the question whether that issue should be dismissed out of the case. Perhaps our further discussion will sharpen the issue and then we can present it to you.

The question that still exists in my mind is what are the acts pursuant to the conspiracy alleged in the Complaint that actually caused the damage? To us the only act alleged in the first cause of action, that is, the Sherman Act conspiracy under Section

1, and also under Section 2, is the refusal of Sunkist to sell oranges to plaintiff at a price as low as he wanted. And until we get that act determined, or whatever those acts are, it seems to me that we can't proceed to identify the other issues that are raised by the pleadings that will have to be tried.

Perhaps in view of your views on the question of amendment, perhaps the plaintiff will desire to amend the Complaint, and at that time we can see what he puts into it and raise [19] the issue.

With respect to the statute of limitations, our views are that the continuing performance under the contract would not be an act injuring the plaintiff, and we did not attempt to brief that fully in this brief, because it hadn't been raised at that time. So we would like an opportunity to brief that before it is finally decided, if we may have that opportunity.

The Court: Why do you think, though, just on the matter of logic, then, that continuing performance under the contracts would not be the injury? You start out with the proposition, first, the contracts are executed; no damages have been sustained by anybody. All right. One shipment is made, a very small amount of damage has been sustained by somebody.

Mr. Williams: There wouldn't be any injury on merely making a shipment pursuant to the contract. You have to have another fact there, and that is the refusal to sell oranges to the plaintiff. If the plaintiff was able, as he was in prior years, to obtain oranges from his original supplier, then he would

suffer no damage whatsoever. So that to us the injury to him is the refusal to supply him with oranges. He normally obtained them from somebody else. But the injury, his real injury arose from his inability to get oranges at the price he wanted. If he had been able to obtain them [20] the contract wouldn't have hurt him at all—the shipments under the contract wouldn't have hurt him.

The Court: Supposing he never asked you for oranges, never ask you for oranges at all, but because of these contracts there would be no sense for him to buy oranges at the market, because of the situation that resulted between Sunkist and the competitors, couldn't there be damage to him?

Mr. Williams: Not unless you put in another fact, your Honor, and that would be that Sunkist had done something to prevent him from getting oranges on the market at a suitable price.

The Court: Don't forget that Sunkist occupies, and the defendants occupy a dominant place in this industry in California, and to the extent that they have that dominance, to that extent his ability to get oranges outside is limited.

Mr. Williams: No, your Honor, that is not true. It is limited to the extent that it cuts down the supply of oranges; but the facts will show that although the Sunkist price was $40.00, that the plaintiff bought oranges as low as $25.00 a ton from outside sources during 1951.

The Court: But my point is this: Supposing Sunkist had a hold on ten per cent of the oranges

and there was 90 per cent of the market available to the plaintiff. All right. He could get a certain number of oranges at a certain price. But supposing, conversely, Sunkist had 60 or 70 per cent [21] of the oranges, then the available market available to him was cut down to 30 or 40 per cent. Doesn't that change the situation?

Mr. Williams: I am not sure it does, your Honor, because the 70 per cent is a legal position. There is no question it legally has that position under the Capper-Volstead Act.

Now, the question arises whether any injury that flows from that legal position is the kind of injury one can recover from, because it is a legal position. It is not like an illegal monopoly where you might attribute to it that all results necessarily are harmful in violation of law.

So in this case it seems to me that the plaintiff has to go further.

We are going beyond our prior discussion considerably here.

The Court: Yes, we will have to take that up later. I realize that. I don't know all the facts that plaintiff thinks it has. We will have to see. But I propose to permit the plaintiff to amend if the plaintiff wants to.

Mr. Williams: Your Honor, will you allow us to submit—after the amendment may we submit a brief on this question?

The Court: Certainly.

Mr. Williams: We just want an opportunity to be heard on that point. [22]

The Court: I would assume that the ordinary procedures will be gone through with that; you will file motions that raise points that you want to raise, and we will argue them out.

Mr. Fisher: After the amendment is made?

The Court: Yes. And my position in permitting the plaintiff to amend, if they so do, is in accordance with the rules of the federal court. It is very lenient. That is what we do at pretrial. I take it there will be no objection to amendment?

Mr. Williams: Not the general idea.

The Court: You are reserving your right to attack the Complaint as amended?

Mr. Williams: Yes.

The Court: Then that solves that problem for this stage of the proceeding.

How much time do you want to amend?

Mr. Dixon: Well, I will naturally, Judge, endeavor to get an amendment prepared and filed as soon as possible. I must say at this time that I am still in the process of endeavoring to secure additional information that I think will develop certain phases of this case that I think should be presented to the court on the trial of the case. As to time——

The Court: Why don't we fix a date, and then extend it if the problem arises? [23]

Mr. Dixon: I will endeavor to get it in within 30 days, and sooner if possible.

The Court: Then, say, 20 days thereafter to file your motion?

Mr. Fisher: We would like 30 days.

The Court: 30 days will take us just before Christmas, to file the Complaint.

The Clerk: 20 days from service of the Complaint?

The Court: 30 days.

The Clerk: 20 days from service of the Complaint to respond?

The Court: No. 30. 30 and 30. What date would that be? Christmas comes on——

The Clerk: It depends on when the Complaint will be served. You meant 30 days from service?

The Court: Yes. December 24th is a Friday. December 24th to file the Amended Complaint, and 30 days after service to make your motions. All right?

Mr. Williams: That is fine.

Mr. Fisher: Yes.

The Court: With the understanding that if either side needs more time, we are not going to quibble about that part of it.

Mr. Dixon: I am again frank to say that had I drawn this Complaint in the first instance it probably would have [24] been a little different complaint, and the allegations would have been different. I think, however, it is broad enough to present, even in its present form, to present the evidence that we want to present. I agree, however, that the issues as may be determined by the Complaint in its present form are not as sharp a focus and are not as clearly presented as they should be to enable the court to properly present the case to a jury under proper instructions. [25]

* * *

In the United States District Court, Southern District of California, Central Division

No. 13788-C Civil

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, et al.,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, February 14, 1955

Appearances:

For the Plaintiff and Intervening Trustee:
WILLIAM C. DIXON, ESQ.

For the Plaintiff:
BERNARD REICH, ESQ.

For the Defendant Exchange Lemon Products Co.:
CLAYTON, STARK & ROTHROCK, By D. E. STARK, ESQ., and
POPE & BALLARD, By M. C. WILLIAMS, ESQ.

For Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company:
FARRAND, FISHER & FARRAND. By
ROSS C. FISHER, ESQ.

The Clerk: No. 5 on the calendar. No. 13788-C Civil, Winckler & Smith vs. Sunkist.

The Court: Mr. Williams.

Mr. Williams: I want to explain to your Honor why we made this motion.

Our first inclination on this case was to file an answer, so we would speed things along. The more we studied the complaint the more we found a lot of the ambiguities of the old complaint were still in this one, and that is the same problem, you recall, that we ran into on the pretrial conference. It became impossible, when you started to analyze the complaint, to tell exactly what the cause of action of the plaintiff was, or the causes of actions, and therefore the plaintiff was given leave to amend.

We felt that if we pointed out the questions that had to be decided on pretrial conference, in order to ascertain what the issues were, it would be helpful to the court, and we had a duty to the court to make the motion and point out these matters, ambiguities, that had to be decided in order to determine what the issues were in this case. So we considered this motion not in the status of a motion made to a complaint that has just been filed, but we considered this motion as being a [2*] continuation of our pretrial conference and our statement of the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

issues as pointed out in the complaint that needed clarification.

With that introduction, I would like to take up the first point of our motion. And I am going to follow our memorandum of points and authorities. Our first point was that the amended complaint did not identify the acts of the defendants, committed pursuant to the conspiracy, that are alleged to have invaded the interests of the plaintiff and thus formed the gist of a cause of action.

You will recall that was the point that we discussed at our pretrial conference, and the court ruled that the act was the important item in the cause of action.

Now, looking at this complaint in the first count, it has six subparagraphs set forth from (a) to (f). Each of those paragraphs allege certain acts of the defendant.

Now, if it the theory of the plaintiff that each one of those acts caused damage to the plaintiff, so as to give rise to a cause of action for damages that are the proximate result of that act, that is fine. We thought it would aid the court and would aid us and the parties in deciding the issues if the plaintiff would state which of these acts they have relied upon.

If it wishes to state it relies upon all of them as causing damage, why, that is fine; if it wishes to state that it [3] relies on one of them, that is fine.

Here is the problem. If you take the first act, which is (a), subparagraph (a), page 11, it says:

"Defendant E.L.P., by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural * * *" and so forth "* * * juice."

It says it was done without profit.

Now, how could that act possibly injure the plaintiff?

The mere fact that E.L.P. agreed to process oranges for E.O.P. under a custom packing agreement during that season?

That is our problem.

Does the plaintiff have a theory that that caused damage?

We just can't see how that could happen.

The only one of these acts, it seems to us, that really fits the nature of an act injuring plaintiff and forming the basis of a cause of action is (f). So, therefore, in our motion we suggested that this paragraph be stricken with leave to amend, in order that these acts which form the basis of our action, which identify the causes of action, are stated.

That is the first point.

I suggest, your Honor, that perhaps we might move faster if we take these points as they arise, instead of my talking to all of them and then having discussion on all of them. [4]

The Court: Mr. Dixon, what, briefly, is your reply to counsel?

Mr. Dixon: May it please the court, I think one

of the charges in this complaint is that it is conspiracy among these defendants to eliminate the competition of the plaintiff in the industry described in the complaint. Certainly one of the acts of the defendant E.L.P. in processing the oranges of the other defendant Sunkist, without cost—I mean at cost and without profit to E.L.P., would indicate that they were a party to the conspiracy charged in the complaint. Because, certainly, ordinarily you don't do these things for somebody with whom you are presumably dealing at arm's length and with whom you are also in competition, without some reason. And I think that allegation speaks for itself as one of the things which the defendant E.L.P. did under this conspiracy.

It would be a question for the jury to decide whether or not they entered into the conspiracy, and if so, whether that was one of the things they did to promote it.

Mr. Williams: That act might be evidence, but it is not the kind of an act that could form the basis of a claim for damages. The act of E.L.P. to enter into the agreement to process oranges for E.O.P. could not cause monetary damages to the plaintiff and form the basis of a cause of action. It didn't invade any right that he had.

The Court: Isn't the law of criminal conspiracy the same [5] as civil conspiracy on that point, that although the damage flows from overt acts, if the evidence shows that A, B and C are conspirators, and if A commits the overt act that causes damage, aren't B and C liable?

Mr. Williams: That is not the point here.

I agree with your statement of the law, but here is a case where we are asking that they identify what the acts of A were.

B in this case, as we see it, E.L.P., did not commit any act causing the damage. This act identified in (a) is to us not an act that could possibly cause any damage to the plaintiff. The only act that could cause damage is the one in (f) where it alleges that E.O.P. refused to give the plaintiff a custom packing agreement.

That might have caused plaintiff damage, but this agreement betwen E.O.P. and E.L.P is not the kind of an act that could form a foundation of a cause of action, because it didn't cause the damage. It might be an act in the conspiracy, yes, and it might tie E.L.P. in. But what we want segregated is which of these acts caused the damage, so we won't have to prepare a case on the theory that all of these acts caused damage, and we have a lot of issues that explode when we come to trial.

We are just trying to identify the issues.

The Court: Go to your next point. [6]

Mr. Williams: The next point is identification of the conspiracy.

Normally, a conspiracy is pleaded in terms of the agreement that constitutes the conspiracy.

No place here is there any statement of what that agreement consists of. You can't have a conspiracy, unless you have an essential agreement between the conspirators to accomplish some objective. There is no statement here of any objective.

In our brief we state the complaint failes to disclose how many conspiracies are claimed.

In the reply brief Mr. Dixon stated there was only one claimed. And he has disavowed any claim, apparently, of conspiracy within a company among the officers and directors and the company itself. So he talks now only about one conspiracy.

The Court: We are talking now about count 1, aren't we?

Mr. Williams: I am talking about count 1.

The Court: It says: "had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in California."

Mr. Williams: That kind of a broad general statement does not identfy the conspiracy as required under this kind of a statute. Where you have a statute in such general terms as the Sherman Act, you can't just plead the conspiracy in [7] terms of the statute, because it doesn't identify it. You have to go into particulars. And that, I think, is true of both civil and criminal conspiracy law and applies here.

The Court: The next paragraph, "conspired and entered into contracts which had the effect of tending to eliminate and of eliminating the plaintiff as a competitor."

Mr. Williams: That is the defect. It talks only in terms of effect. It says there was a conspiracy that had the effect of restraining trade.

Was it a conspiracy to fix prices? Was it a con-

spiracy to boycott? What was the nature of the conspiracy?

Now, the way these things are normally pleaded has been developed by the Antitrust Division in many cases. They generally start out with a general statement, which this might meet the requirements, and then they descend in this paragraph—this is the key paragraph stating the terms of the conspiracy, that we think this complaint ought to have:-

The aforesaid combination and conspiracy has consisted of continuing agreements—that alleges an agreement among all the defendants, which is not alleged here—a continuing agreement and concert of action among the defendants, the substantial terms of which have been and are—then it sets forth in several subparagraphs what those terms are. [8]

Here we don't have any unifying plan alleged. What was the planned objective of these defendants?

Nothing but the vague term to restrain trade.

That is not sufficient to allege a conspiracy. Going to trial, we can't prepare to meet that kind of vague allegation.

In our pretrial conference it will be necessary to nail down, to identify, what the objective unifying element of this conspiracy is that binds these various parts into a whole.

As the pleading now stands, it is just a conglomeration of acts by the defendant and fails to state the thread that ties them together. It is like a mass of beads in the hand without a thread to string them together and make a necklace.

The Court: This first cause of action has to be read in light of Section 1 of the Sherman Act, and as I understood Mr. Dixon's statement at the last meeting, it was to the effect that—it probably applies to both counts 1 and 2, that these cooperatives exercise, possess and exercise an exempt position because of their nature, so long as they tend to their knitting.

When they get beyond the scope of that monopoly, which they may legitimately have by virture of the statute, then they have crossed the line.

I read this first count in the light of section 1, and I read the second count in the light of section 2 of the Sherman Act.

Mr. Williams: That is right, your Honor, but Section 1 [9] does not shed light on the charge here, because this does not set forth what the nature of that restraint is.

What was the restraint of trade in this case?

It wasn't fixing prices.

It isn't clear what the restraint is.

It merely repeats the language of the statute, but it doesn't tell you what the objective of the conspiracy was, what any common objective was.

In a normal conspiracy that is always stated. In mail fraud cases they have the conspiracy to defraud, which is not here.

The Court: I would say that one of the purposes stated was to eliminate the plaintiff.

Mr. Williams: If that is the objective, that perhaps is all that we want.

The Court: I don't think there is any contention

here that there was any price fixing in the ordinary sense?

Is there that contention?

Mr. Dixon: No, there isn't.

Mr. Williams: Under this language it would be available to the plaintiff to say, "We allege restraint of trade, and price fixing is a restraint of trade, so now at the trial we claim price fixing."

The Court: But, Mr. Williams, you are a very able lawyer in the field of antitrust, I think Mr. Dixon is too—I think [10] both of you have had a good bit of experience, you both have been with the government and have wrestled with these cases—I haven't any doubt but what you and Mr. Dixon could sit down at a pretrial conference and know what you are shooting at in two or three minutes, and perhaps do a better job than worrying me.

Mr. Williams: That is really the basic question here. It is really just a continuation of the pretrial conference. If we can sit down and work this thing out and specify in writing——

The Court: If it is a continuation of the pretrial conference, then the first thing you should do before you come to me is sit down together and see what you can work out. Because that is the way we ordinarily work out pretrials. The parties see what they can do themselves, and after they run into a stone wall, then the court picks up and takes over where they can't.

Mr. Williams: Would your Honor be available at any time Tuesday or Wednesday?

The Court: No. I am going to Santa Barbara

and will be there all of this week, and then I go back next week for a series of other condemnation trials, so I won't be back here until the first of the month. I will rule on this motion. I will be available later from time to time on your pretrial conferences. [11]

Mr. Williams: In this connection, with respect to these specifications more accurately defining the conspiracy, there is an order entered by this court, pursuant to one of our interrogatories, requiring the plaintiffs to state the terms of the conspiracy.

That is exactly what we are asking for here. If it is stated here, or is stated there, we have it for the purposes of the pretrial order, and then, again, it would be reduced to writing.

The Court: To assist you in working with Mr. Dixon and with counsel for the plaintiff on the pretrial order, I think, just as I directed Mr. Dixon before, to spell out what the causes of action were under the other complaint, that I would again direct him now to, as a pretrial procedure only, and not as a matter of striking from a complaint or monkeying around with it any further, I would direct him to informally present you with his views as to these various causes, and start from there and see what you can work out.

Mr. Williams: Perhaps we can work out some of these points, particularly these we have been discussing. [12]

* * *

The Court: I have my own idea on this, and that is this: It seems to me that E.L.P. has a legal mo-

nopoly presently under [20] the way it is set up.

Mr. Dixon: Correct.

The Court: If E.L.P. acted on its own within the limits of this right that it has, which is a pretty extensive right, it is hard for me to see how you would have a monopoly of E.L.P. alone.

I think this largely hinges on concert with other defendants.

Mr. Dixon: That is correct.

Mr. Williams: But he is using the word "attempt." That causes us considerable difficulty in making a motion for summary judgment, which we would still like to make in this case when we get the pleadings nailed down and concrete.

Mr. Dixon: If the Court please, during my ten years of service with the government in the Antitrust Division I drafted many complaints and indictments. I do not point to that fact necessarily for anything that it may mean or not mean with reference to this complaint, except that I do feel that this complaint in every respect adequately advises all of the defendants of the charges that may be made against them—I mean that are made against them in the complaint, and which they would have to meet in the trial of this case.

Now, I know we have a trial date here now of March 22nd, and even after we filed our amended complaint, or even before that, I endeavored to work with the defendants to get a stipulation [21] here, to move this case along, on facts that were not in dispute, based upon the two years of deposi-

tions and interrogatories that are already in the files of this case, and then we were met with these motions.

To me, I could only state that I feel that this complaint does give the defendants all the information that they need to prepare an answer, or any other defense that they may have to the charges made. And I don't want the plaintiff here at this stage of the proceeding, or at any other stage, to be prejudiced on being able to have submitted to the jury any one of the possible charges that are sustained or borne out by the evidence under Section 1 or Section 2, which means simply this: With reference to what Mr. Williams is now talking about, it may well be that the charge of an attempt to monopolize any part of the citrus fruit industry, I mean the juice industry, on the part of his client, on all the evidence, may not be borne out. I am not saying that it will. I don't pass upon that question at this time. We are still in the process of completing discovery. But it doesn't mean that a comparable charge of attempt to monopolize might not be borne out against the other defendant, Sunkist, in this case.

What Mr. Williams is asking at this stage of the proceedings, based upon the complaint, as I understand it—he says, "I don't know whether we are charged with an attempt to monopolize, a conspiracy to monopolize, under count 2, or what." [22]

I say he is charged with all of those provisions of the statute at this time, and I don't know of any reason why he should be limited.

I think the allegations of the complaint can well satisfy any of the charges, I mean the details of the complaint can well satisfy any of the charges made in counts 1 and 2, or the first and second causes of action.

Mr. Williams: It makes quite a difference, your Honor, if we are charged with an attempt, as apparently plaintiff intends to do, as to what it is that we attempted to monopolize. The language here, "attempted to monopolize in natural and frozen concentrate fruit juices"—if the plaintiff really means that, it means we have to prepare a defense on grapefruit and orange juice, as well as lemons.

What we are asking is if that is the charge, we think it should be stated in a separate paragraph, or at least in a separate paragraph in the pretrial order, so we know exactly what it is that we are to meet in this case at the trial.

There is another problem here, and that is the problem of joint attempt. The language of the Sherman Act does not speak of any joint attempt to monopolize. It speaks of monopolize, attempt to monopolize, and conspiracy to monopolize. Is there going to be some claim here that a joint attempt to monopolize is different than a conspiracy to monopolize?

It seems to us if the parties agree to do something, that [23] constitutes a conspiracy. And a joint attempt, if they didn't do anything, and did something by parallel action, that that is not an offense under the Supreme Court decision in the Paramount case.

Mr. Dixon: To answer that, your Honor—I

don't mean to interrupt, but I assume that Mr. Williams would like the answer from the plaintiff at this time on that question. I don't know of any cases that hold that you can have two attempts to monopolize in the same case, without it being a conspiracy to monopolize. And that is charged in the complaint here as to all of the defendants. But in the same breath they are also charged individually with an attempt to monopolize, insofar as the cause of action is concerned.

To me it seems as clear as could be stated in the amended complaint.

Mr. Williams: As I understand it, there is no claim of any joint attempt——

Mr. Dixon: It would be a conspiracy if it were a joint attempt.

Mr. Williams: The next point is also in connection with this second cause of action.

The subject of the monopoly is said to be natural and frozen concentrate fruit juices processed in California.

Our point here is that there is nothing set forth in the complaint to show that such fruit juices are an identifiable [24] part of commerce.

Obviously, if fruit juice is processed in California, the same as they are in Florida, and you have the relation as you do, that the California production is a small percentage of the total production—I don't recall the precise figures, but I think it runs five to ten times as much production in Florida—even if you have all of, say, 10 or 15 per cent of the market, you can't possibly have a monopoly. So we say that this complaint ought to have facts in it

showing that there is something peculiar, something unique, something distinct about these California juices——

The Court: Where do you come from, counsel?

Mr. Williams: South Dakota.

The Court: I thought so. We all out here know what we mean by California orange juice and California grapefruit juice, and I think people all over the United States do. You don't want to get this issue submitted to a jury of people out here in California.

Mr. Williams: Your Honor, it would certainly assist me if these matters which might be judicial knowledge in the State of California, and wouldn't be in other courts, would be set forth in the complaint.

I submit your point is well taken, because my clients advised me of that, and I asked them why, and they are not so sure. [25]

The Court: This is not a charge to monopolize the entire or total frozen fruit juice industry.

Mr. Dixon: Correct.

The Court: But that which involves the West.

Mr. Williams: It must be an identifiable part. It has to show some unique characteristics.

The Court: Don't all these canned juices come from California say, "California orange juice"?

Mr. Williams: You have to have some difference in the market. Supposing California and Florida are chosen equally by people in the market place, then a monopoly of California obviously could have no economic effect, it is such a small part of the

market. So there should be facts set forth showing that it is an identifiable segment of the total juice market.

The Court: I am not going to do anything about it here. You take it up with Mr. Dixon and see what you can work out on it.

It may involve some factual issue that has to be submitted.

Mr. Williams: I think it does.

The Court: I will tell you now if you submit any factual issue to the jury out here as to whether there is such a thing as a difference between California juices and eastern juices, your answer will be obvious. They will know the difference. [26]

Mr. Williams: It is a question of whether it is only a fact or local pride, which is intangible, or whether it has some economic significance.

For instance, in the linen rug case we cited, the linen rugs were unique and could be a subject of monopoly because if you dropped a cigarette on them, they would merely scorch, it wouldn't burn a hole like a wool rug; they could be used in a hall where people come in with wet feet and they wouldn't rot with water, where a wool rug might, and that made them unique and an identifiable part of commerce.

It is that type of thing which should be shown here also. [27]

* * *

Mr. Williams: There is another point, that is the Silzle contract, which, again, was entered into more than [35] three years prior to the amended

complaint, and it was not mentioned at all. Would you care to argue that?

Mr. Fisher: Yes.

That was a point that I was very much interested in, your Honor.

The Court: Silzle was made a defendant in the first action, was he not?

Mr. Fisher: He was not.

The Court: Was he named as an unknown——

Mr. Fisher: There were John Doe defendants named. The original complaint was filed on February 1, 1952, and the named defendants were Sunkist, E.O.P., E.L.P., and Treesweet. There were John Does named. There was a typical John Doe allegation.

When the amended complaint came down, those were eliminated.

Silzle is not a party defendant in the action. It was not named as a party defendant. Now, the allegation of the original complaint was that "all of the defendants"—now, the defendants would be the four named defendants—"each well knowing and acquiescing in the action of the others, contracted, combined, and conspired with each other."

The same is true of the allegation of the second cause of action. They are attempting to bring in the Silzle contract, saying Silzle is a co-conspirator but not a defendant. [36]

The acts which were done, the delivery of fruit, which was the thing that might have caused the damage under the Silzle contract, all happened

more than three years prior to the filing of the amended complaint.

We think the point is well taken that the Silzle contract is barred by the statute of limitations.

The Court: What do you say to that, Mr. Dixon?

Mr. Dixon: Well, in the first place, your Honor, the Silzle contract was brought out and gone into in the depositions and the interrogatories. Up to that time there was no specific reference to the Silzle company in the complaint, except insofar as it might have been referred to as one of the John Doe conspirators. However, the original complaint clearly alleges that the defendants, plural, entered into contracts which were in restraint of trade.

Now, this is one of the contracts that the defendant Sunkist entered into. And if it isn't proper to now allege that Silzle was one of the co-conspirators, I submit that all the antitrust law that I have ever learned is without any foundation or basis.

Mr. Fisher: But I point out, again, that the allegation of the complaint was that the defendants contracted with each other, and Silzle was not a defendant.

The Court: There are various allegations in there. That is one that you refer to. If Silzle, himself, was opposing [37] being made a party, or something, it might be different.

Your argument sounds to me like the kind of an argument that Silzle would make if he were brought in now as a defendant in this case. But he is not a defendant. He is merely named as a co-conspirator.

There are general allegations about the various contracts that these defendants had.

Now, supposing the plaintiffs want to rely upon some other contract. They probably would have a right to rely on the contract, whether the other contractor was named as an unindicted co-conspirator, or not. I don't think it makes a lot of difference, except it is in the nature of pointing up to you, informing you of the particular thing that the plaintiff intends to rely upon.

Mr. Fisher: But the point is, your Honor, that the fruit which was delivered under the Silzle contract, the acts which might have caused damage under the Silzle contract, all occurred more than three years prior to the filing of the amended complaint.

The Court: Supposing I struck out from the complaint all reference to Silzle as an unindicted co-conspirator, do you think that you could resist the introduction of evidence that your company had contracted with Silzle, as well as with 20 or 30 other people, sold them certain fruit at certain prices, and bought fruit at certain prices, and so forth? Wouldn't the [38] transactions that the defendants had with Silzle, or anybody else, have a bearing under these allegations of contracts in restraint of trade?

Mr. Fisher: But the allegation of contract, in the original complaint—and that is what we have to go back to in testing here—was that they contracted with each other, the named defendants.

Mr. Williams: Your Honor, there is another

point, and this relates to E.O.P. because they charge a conspiracy with Silzle, and they are using the Silzle contract as a basis to enlarge their damages. If we are tied into the conspiracy, we are affected by this contract. So the point we wish to stress is that the Silzle contract was not identified or charged in the first complaint as an act causing damage, and therefore under the theory that I just expounded of the continued conspiracy with the various acts committed to cause damage, and the statutes starting to run from the commission of the act, that if they claim that the Silzle contract was an act causing damage to the plaintiff, they did not plead that act in the original complaint and they cannot plead it now, because more than three years have gone by.

It is on that basis that we stress the Silzle contract should be stricken from the complaint.

The Court: You can point the problem up in a pretrial stipulation. I know Mr. Dixon will cooperate with you in getting [39] the problem pointed up. You may renew your contentions. Presently, I don't think they are good. [40]

* * *

Tuesday, November 29, 1955, 10:00 A.M.

The Court: Call the case.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company and others vs. Sunkist Growers, Inc., and others. Jury trial.

Mr. Dixon: Ready for the plaintiff, your Honor.

I wish to state, however, that before proceeding further I have a motion that I wish to make to the

Court. I am not sure whether you wish it to be heard at this time or not.

The Court: I think you had better come in to chambers and I will hear the motion. Mr. Reporter, Mr. Clerk.

(The following proceedings were had in the chambers of the Court in the absence of the jury panel:)

The Court: The record will show who is present here. The reporter, the clerk, Mr. Dixon, Mr. Irwin, Mr. Strachan——

Mr. Hurd: I am Mr. Hurd. Mr. Strachan isn't here today.

The Court: ——Mr. Fisher, Mr. Stark, Mr. Williams, and Mr. Walker.

Mr. Dixon: May it please the Court, I wish at this time to move the dismissal of the amended complaint as against the defendant Lemon Exchange Products Company or Exchange Lemon Products Company.

In view of the fact that the plaintiff company is in the jurisdiction of this Court under Section 10 and creditors are [2*] involved in this proceeding and in this decision, I feel that I should make a statement for the record in connection with this motion.

At the time I entered this case over a year ago the materials made available to me by the plaintiff consisted primarily of extended depositions, rather extended answers to numerous interrogatories, I ex-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

amined material then available and came to the conclusion that there was sufficient evidence at that time in the record which was submitted to me to justify the continuance and the presentation of this case insofar as the defendants Sunkist and Exchange Orange Products was concerned. There was, however, some doubt in my mind about the defendant Exchange Lemon Products Company. I discussed the matter with the trustee at that time and informed him of this fact, but indicated that I did not feel that I would care to take the responsibility of making any recommendation to him with reference to the dismissal of any of the defendants in this case until I had adequate opportunity to fully inform myself further concerning the case by further discovery proceedings. [3]

It was on that basis that the amended complaint was filed and, as the record will show in this case, pretrial negotiations or proceedings were had.

It is perhaps stating the obvious to state that the financial condition of the plaintiff did not permit the extended investigation of the case that I would have liked to have made had the finances been available to employ or to hire those personnel or the personnel that would be necessary to conduct such an investigation. I therefore have had to rely primarily upon further discovery proceedings in this matter in preparing it for trial as to all defendants.

During the course of those proceedings, it became apparent to me that there were several latent ambiguities in the answers to the interrogatories of defendants Sunkist and EOP, which required fur-

ther clarification. I believe I mentioned some of those to the Court in previous pretrial proceedings.

To make the record clear on the matter, we resorted to what I call, for want of a better description, the last three or four months informal trial procedure conferences in which we endeavored, working with counsel for defendants, to clarify these ambiguities, and to also secure further information that I felt was necessary before I was to proceed or able to proceed to the trial of this case.

To indicate or illustrate the situation, your Honor, it was only yesterday that Mr. Stark brought to me, representing [4] Exchange Lemon, some clarification of the answers to one of the interrogatories, namely Interrogatory 14, addressed to Sunkist and Exchange Orange, pursuant to which the figures with reference to the amount processed by Exchange Lemon for Exchange Orange were varied considerably, and in a sense it did make some difference in the cost computations, among other things, with reference to the amounts paid to ELP by EOP for those processing arrangements which were conducted on a so-called cost basis.

I do not mean to suggest and I do not want the record to in any way carry any inference that we have not had the fullest co-operation from counsel for Exchange Lemon, Mr. Stark, and Mr. Hurd and Mr. Fisher, during the last three or four months. I think substantial progress has been made in securing information I thought was necessary before we went to trial in this case.

All of which brings me to my motion, that I feel that I am now in a position and have recommended to the Trustee, and, as I have said, this has been under consideration really from the outset, that the case be dismissed as to Exchange Lemon, and the Trustee has accepted my recommendation and, therefore, for the record, I am making the motion, based upon the facts heretofore submitted to the Court in connection with the motion, which I feel is necessary in view of the fact that creditors are involved in this proceeding, and [5] that, therefore, the record should show the reason for this motion.

* * *

Mr. Hurd: I have no objection to the dismissal of Exchange Lemon provided it is with prejudice, and I assume that is what Mr. Dixon means.

It does raise a collateral question. Mr. Stark and Mr. Williams have both represented Exchange Lemon from the beginning of the proceeding, but in more recent times, going back to certainly around the beginning of this year, each of them has been very active in problems relating to the entire case. I have assigned them segments of the preparation from time to time without particular regard to the client of their original representation. Consequently, I should like to have them available to participate and assist me in the trial of the case, and if it is necessary to present formal motions with affidavit support, or any other support, I will need a little time to do that. If they may be admitted for the purpose of representing the remaining two defend-

ants, Sunkist and Exchange Orange, without the formality of motions, that is a different situation.

The Court: Well, the motion definitely raises that question. Whether that has anything to do with whether the motion to dismiss should be granted or not is another thing. [6]

As Mr. Dixon was talking, I was looking at the rule. The dismissal has to be by order of Court. It is not by stipulation, nor is it a voluntary dismissal prior to answer, and the Court could impose such terms as it saw fit. One of the terms, of course, would be that it be with prejudice.

Did you make the motion with prejudice?

Mr. Dixon: Your Honor, I am not concerned about that except, of course, the allegations of the complaint. We will still proceed with the trial on the theory set forth in the complaint. It will, therefore, be necessary to undoubtedly call some of the witnesses or at least one or two of the witnesses from Exchange Lemon, and the only concern that I have is that if we do call them, we want them to be called under Rule 43(b). I have no concern about the dismissal with prejudice apart from that. [7]

The Court: You are still going to rely upon the fact—or, are you—that Lemon is a co-conspirator in this case?

Mr. Dixon: That's right.

The Court: Will there be any contention raised that if a dismissal was with prejudice it would prevent the plaintiff from making that contention? I can't see that there could be. A dismissal is not the equivalent of release of a joint tort feasor. Plaintiff

has ordinarily the right to elect who he is going to proceed against.

Mr. Hurd: I would not want to commit myself offhand, but my initial reaction, your Honor, is that a dismissal with prejudice would operate as res judicata from a legal standpoint, but I would doubt that estoppel by judgment, a verdict, would apply, which is the estoppel as to facts, and my offhand reaction would be that even though Exchange Lemon were dismissed out of the case with prejudice, which would be a bar to ever suing them again for that, it wouldn't be a restriction on their proof as to conspiracy in this case.

I don't want to commit myself. I am just telling you my offhand reaction.

The Court: That is my offhand reaction, too. In other words, when a person is a party you get a judgment against him. If he is not a party, you can't. But you can claim that certain people are co-conspirators even though they are not made parties. You do that at the inception, and I don't see any [8] reason why you couldn't do it subsequently.

My reaction is the same. However, I think I would like to have something more definite as to what our position is going to be before I grant this dismissal with prejudice on that point.

We will pass that for a minute. [9]

* * *

The Court: I am going to grant the motion to dismiss the complaint as to Lemon. It will be with prejudice. The order is being made on the assump-

tion, which I think is correct, the plaintiff may still have whatever value there is in contending that Lemon is a co-conspirator in the case. [21]

* * *

The Clerk: Do you want Mr. Dixon to prepare a formal written order of dismissal on this?

The Court: Yes, I think we had better have a written order of dismissal.

Mr. Dixon: All right, your Honor, I will prepare such an order.

The Court: Is there anything further?

Mr. Dixon: I might say at this time, also, that I believe, your Honor, that we will also move to further limit the issues in this case by dismissing the fourth and fifth causes of action which deal solely with the application of the state law to the evidence.

The Court: Are you doing that or just talking about it?

Mr. Dixon: Well, I think we can do that at any time, so, to answer your question, I will not do it at this time.

The Court: Is it your intention to do that?

Mr. Dixon: I think so, your Honor. [22]

* * *

December 7, 1955, 2:00 P.M.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company vs. Sunkist Growers, and others. Further pretrial hearing.

Mr. Dixon: Ready for plaintiff.

Mr. Fisher: Ready for the defendants.

The Court: The purpose of calling you together was to spend some little time on issues. I think both sides received a copy of some material which I forwarded.

Mr. Fisher: We did, your Honor.

Mr. Dixon: We did, your Honor.

The Court: This is certainly not a list of all the issues, but it is a list of the issues that probably are in the case. There are probably more.

I wanted to indicate some tentative rulings in some of these matters. Some of them I think can be disposed of pretty readily. [3*]

* * *

With reference to these issues, on the item listed as No. 1, "Allegations of Public Injury," I have read considerable law on that subject, I Sheppardized and read every case that cited Shotkin, and my view is presently that there need be no express allegation in so many words that there was public injury. The question is whether or not from the allegations of the complaint it would appear that there is public injury.

And, secondly, my opinion is that the complaint so states public injury.

I have in mind the language in U. S. vs. Employing Plasterers Association, 347 U. S. 186, and a very excellent opinion by Judge Sugarman in the District Court of New York. I will take that back. It is not by Judge Sugarman. It is a decision in Boerstler vs. AMA, 16 Federal Rules Decisions 437.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

My thought is that the defendant should have a right to do those things necessary in their opinion to preserve the record. Unless you have contrary views, I think this should end discussion on public injury.

Let me add one other thing.

Of course after the case is tried there will still be the question as to whether or not sufficient facts have been shown at the trial to bring it within the public injury rule. I indicated in the outline, first, a question of law, [5] and then secondly (b) after plaintiff's case is in it wll be tested by the facts.

Dd you want to comment on this, Mr. Fisher?

Mr. Fisher: Just very briefly, your Honor, and that is we would desire to object to the introduction of any evidence, because in our opinion—we still are of the opinion that the complaint fails to state a cause of action; that it does not properly allege public injury.

I think that is as far as we need go.

The Court: I might also point out that it is in the Court's discretion, of course, to always permit an amendment to conform to proof. Whether that will be necessary or advisable I am not passing on at this time. You may at any time during the trial make such motions or objections as will preserve your record.

It would seem to me that a motion at the inception of the case after the jury was impaneled, an objection to the introduction of any evidence on that ground, and probably again at the close of the plaintiff's case, and at the close of the entire case,

and again in your instructions, should amply preserve your record.

Mr. Fisher: Yes.

The Court: The second item I wanted to comment on, skipping around a little bit, is No. 9. Section 3 of the Robinson-Patman Act, Section 13a, is an antitrust statute. [6] I found a lot of cases that say it is, and only one case—I will not limit it to one, but some that express some doubts, and Law Review articles expressing to the contrary.

Moore vs. Mead Bakery is a case involving Section 3 of the Robinson-Patman Act. The Supreme Court reversed the Circuit and reinstated the decision of the District Court, based upon those sections.

Mr. Stark: It is still our position, your Honor, that the matter is not finally and conclusively determined by the Moore case, or other decisions, and we still take the position that Section 13a is not an antitrust statute.

We have taken occasion to review the briefs, contentions, and so forth, behind the decision in the Moore case, and it is our view that the case did not involve that question, basically; that the manner in which it was argued and the basis upon which it was decided does not necessarily preclude the point, so it is our desire to continue in our position.

The Court: Will it be satisfactory that you raise that point, for the purpose of the record, in the same manner that we indicated for the other point?

Mr. Stark: I believe that will be sufficient.

The Court: All right.

Some of these other matters are matters of general law. [7]

No. 6, the question of co-conspirators, the right of plaintiff to rely upon acts of co-conspirators, Tree-Sweet, though dismissed, and Lemon, though dismissed.

Is there going to be any contention on that point?

Mr. Stark: I think at the last hearing, at the time the defendant Exchange Lemon Products Company, was dismissed, Mr. Hurd stated as an off-hand matter that seemed to be generally in accord with his understanding of the law as to TreeSweet and Exchange Lemon, but we haven't had a chance to review that; and I haven't had a chance to talk with him since, so I think we are pretty much in the same state there.

As to the first group, the names in the amended complaint, I would assume that refers primarily to Silzle, and that would get us back into the same statute of limitations provision.

We feel that the amended complaint, to the extent that it purports to bring in Silzle, is setting up a new and different conspiracy which is barred by the statute. But perhaps I shouldn't get off into that at this point.

The Court: No. We will take that up later.

Of course, the conspiracy is alleged to be between Sunkist, Orange, Lemon, and I take it there is going to be no contention that presently there is any prohibition against proving that a subsidiary conspired with the parent corporation. [8]

Mr. Stark: That there will be no contention that a subsidiary did conspire?

The Court: Cannot conspire, I mean.

This subject was discussed by Judge Yankwich in Balian Ice Cream Company vs. Arden Farms, 104 F. (2d) 790.

Mr. Stark: I don't believe, so far as its applicability to these defendants, that is, to exempt cooperatives under the Capper-Volstead Act is concerned, that we necessarily concede the applicability of general cases relating to relationships between a parent and subsidiary corporation.

The Court: Judge Yankwich in his opinion points out that at one time there was some question about this problem, but he flatly states that corporations dealing with subsidiaries may be guilty of antitrust violations, and cites in Note 8 a number of cases.

Now, I am inquiring whether you are going to raise that point in this trial.

Mr. Stark: Perhaps I should defer to Mr. Williams on this point. I know that it is a matter that he has done some research on.

Mr. Williams: Your Honor, there are the cases that Judge Yankwich refers to. I think that we will not take a flat position that a parent can never conspire with subsidiary, but we will wish to take the position that in this case the proof will not show a conspiracy falling within the [9] Sherman Act between the parent and subsidiary. [10]

* * *

No. 15. The burden of proof is on the plaintiff on Counts 1 and 2, and on Count 3 the burden shifts to the defendant after a prima facie case is made.

Mr. Stark: As to 1 and 2 of course I don't believe there is any question. On 3, we gather that what your Honor is doing in these notes is paraphrasing the provisions of the Robinson-Patman Act, so far as the burden shifting on justification for discrimination. So far as we are presently aware, that is correct, it is the statutory language. However, the burden doesn't shift, so far as proving the discrimination, as such, by simply a prima facie showing, as we understand it. [12]

The Court: We are in agreement on that, aren't we? Part of your case would require that you show the discrimination, would it not, Mr. Dixon?

Mr. Dixon: Oh, yes, your Honor, we naturally expect to do that.

The Court: All right.

Some of the rest of these may not be so easy.

No. 2——

Mr. Stark: Mr. Williams had one further comment on this that he might make, your Honor.

Mr. Williams: Your Honor, the provision referred to about shifting the burden is in Section 2b of the Clayton Act, and it is my understanding that relates only to a price discrimination under Section 2a.

The complaint also alleges a violation of the Robinson-Patman Act, Section 2d of the Clayton Act, and also Section 3. It is my understanding that

this provision of shifting the burden relates only to 2a and not to the other charges in Count 3.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: I think, your Honor, that the cases we cited in our trial brief support the view that once a discrimination has been established by the plaintiff claiming that discrimination, that the burden shifts and it doesn't make any difference under what section of the Act the evidence is [13] shown, if it is part of the proof required under the section: that the showing of the discrimination establishes that fact to the extent that the burden shifts at that point to justify it.

The Court: We are probably on an academic question, because the plaintiff's proof will probably attempt to show the discrimination, and certainly any justification would have to be shown by the defendants.

Isn't it largely academic?

Mr. Stark: In all probability one of the major issues, as far as Robinson-Patman is concerned, is going to be whether or not there is, in fact, a discrimination in goods of like kind and grade. Not a matter of justification of one of the statutory justifications, but whether in fact these are goods of like kind and grade, and whether, in fact, there were two sales, or two sales at a reasonably comparable time. As to those items, it is our understanding that under either section the plaintiff has the burden on those. He has more than a prima facie burden; he has the burden of proving those.

If he makes a prima facie showing on those, and we desire to make any justification under the statute, meeting competition, and so forth, that we of course have the burden of establishing that affirmative defense or justification. But it seems to me as we understand the facts, the major [14] issue on Robinson-Patman is going to be whether, in fact, there was any discrimination such as is covered by the statute.

The Court: Well, possibly you had better look at the cases Mr. Dixon referred to if you haven't done so already.

Mr. Stark: We will.

The Court: And we will discuss this further at some time.

On point 2, as to the alleged exempt position of the defendants, I think the statute is clear that the defendants have a certain statutory exemption.

As I understand it, there are no cases directly in point on this exemption as applied to facts such as we have alleged here. Is that correct?

Mr. Fisher: Well——

The Court: At least no one has cited any to me. My reasoning in the matter is that the problem is akin to that, for instance, of the trade union, which is exempt from antitrust laws as long as it tends to its knitting, if we can put it that way; that the concerted action of trade union members, even though causing damage to the employer, gives rise to no legal cause of action. The Apex Hosiery case and others.

On the other hand, if the trade union conspires

with employers, then the exempt character, as it were, of the trade union is immediately lost and the trade union stands or falls like any other party to a proceeding. [15]

Judge Yankwich's case, the San Francisco plumbing case, in I think 51 Fed. Supp., and we had the problem up in the Las Vegas case. There are various other authorities available, and I think they are cited in the Las Vegas case.

I am, therefore, of the tentative view that this is a question of fact for the jury under proper instructions. Instruct the jury that in certain instances these defendants have exempt positions under the antitrust laws, but that these exempt positions could be lost by acts, conduct, contracts. It is a question of fact for the jury whether or not the defendants, as it were, lost their exempt position by alleged conduct engaged in.

Mr. Fisher: May the court please, I would like to break it down in really two parts.

First, with reference to the exempt position of the defendants. Refer to paragraphs 3, 4 and 5 of the Stipulation of Facts, which was signed a few days ago, in which it is stipulated that each of the then three defendants, namely, Sunkist Growers, Inc., Exchange Orange Products Company, and Exchange Lemon Products Company are all exempt co-operatives, that each of them is.

Therefore, the exempt status is, I take it, stipulated to, and there is no question about that.

That is correct, is it not, Mr. Dixon?

Mr. Dixon: No, I wouldn't say it was, Mr.

Fisher. I [16] don't like the use of the word "exempt," and the use to which counsel for the defendant places that term.

The law gives the right to any group of producers to organize into corporations or to associate themselves together for the purpose of marketing, collectively speaking, the products that they grow and produce.

That is the full limit of the extent of the so-called exemption that is granted the marketing co-ops, so-called, that are operating throughout the country in various industries, of which the citrus industry is one.

I think the Borden case we cite in our brief and the milk case, Maryland and Virginia Milk Producers case, as well as the Cape Cod Food Products case, all involved so-called co-ops, marketing co-ops, organized under the various statutes permitting that type of association of producers to join together for the purpose of marketing their products, period.

Now, to that extent it can perhaps be said that they are not subject to the conspiracy phases of the antitrust laws, which would otherwise make illegal that type of association of individual businessmen or producers if those provisions of the law were not there to permit them to do collectively what they could not otherwise do.

So when Mr. Fisher says that there is a stipulation or an agreement that the defendants are exempt from the antitrust [17] laws, I cannot agree to that, and there isn't anything in the stipulation that so provides.

The stipulation provides that they are organized under the laws of California as corporations not for profit; but it also provides that they are operating for the profit of the members.

The Court: Well, let me asked you this. You concede that they cannot run afoul of the conspiracy sections in carrying on these purposes for which they are organized?

Mr. Dixon: Yes. In other words, they are permitted to do collectively that which would otherwise be illegal.

The Court: Do you contend they could run afoul under the monopoly section?

Mr. Dixon: Definitely, your Honor. I think the cases referred to in our brief support that position. In other words, let us assume for the moment that they have what we might call a legal monopoly, in other words, they are organized under——

The Court: I didn't state my question artfully.

Mr. Dixon: I am sorry.

The Court: Apart from activities such as alleged in connection with Silzle and TreeSweet, they are permitted to monopolize a part of industry, and they can run afoul of the monopoly section, your position is, as well as they can run afoul of the conspiracy section, if they step outside [18] of the purposes for which they are organized?

Mr. Dixon: That is right, your Honor. In other words, to apply the facts of this case to the law that we are discussing, the defendants Sunkist and their wholly-owned subsidiary Exchange Orange, could

conspire or combine with TreeSweet, which is an independent corporation, not a co-op at all, and with Silzle, or with anybody else that is not a co-op, for the purposes of restraining commerce, and the acts which they performed if they had the effect of restraining commerce would violate the anti-trust law.

The Court: I have two questions and then I will hear from Mr. Fisher.

Mr. Fisher: May the court please, that was the very purpose of my breaking it down into two points.

The Court: Let me ask two other questions, if I may.

Is it your contention, Mr. Dixon, that assuming Sunkist has a co-operative status, and Orange has a co-operative status, that there could be a conspiracy between those two alone?

Mr. Dixon: Yes, your Honor.

The Court: Is it your contention that either Sunkist or Orange could violate the Clayton Act or the Robinson-Patman Act?

Mr. Dixon: Definitely, if the evidence would justify that finding, yes. [19]

The Court: All right.

Mr. Fisher: May I say that we take issue, as your Honor stated it, with Mr. Dixon's position?

The Court: I didn't state anything. I asked two questions, "Is it your position?" and Mr. Dixon gave an answer. I haven't said what my position is on that yet.

Mr. Fisher: I didn't mean your position. Mr. Dixon's position, with respect to the question.

I think if you take the two of them alone they could not conspire in violation of the antitrust law.

I may say that it will be our position, and that follows a fortiori, I think, that the general rule with reference to the conspiracy between a parent and a subsidiary I do not think would apply to the situation that we have here where both the parent and the subsidiary are co-operatives, exempt co-operatives.

Now, there is one further point that I would simply like to clear up, and I think it is really cleared up by the stipulation of facts, and that is it is conceded, we take it, that each of the two remaining defendants, and the Exchange Lemon Products Company, are corporations complying with the Capper-Volstead Act.

Is there any question on that score?

The Court: Complying in their organization and structure is what you mean, I take it. [20]

Mr. Fisher: Yes. That is to say, that there are three subdivisions to that:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the

products of non-members to an amount greater in value than such as are handled by it for members."

As to that, you have my assurance, Mr. Dixon, that each of the three defendants are in compliance with each one of the provisions.

The Court: Are the defendants going to rely on that third subdivision in connection with the Silzle and TreeSweet contracts?

Mr. Fisher: Yes.

Maybe I don't understand your Honor's question. But as I understood it, would the operation of the TreeSweet and Silzle contracts take them out from under the percentage amount here? It would not.

The Court: In other words, the defendants' position is [21] going to be that they dealt with TreeSweet and Silzle within that third subdivision?

Mr. Fisher: Yes.

The Court: What is your position on that, Mr. Dixon?

Mr. Dixon: I would concede the first two propositions, but I will have to deny the third, your Honor, because I think that is a question to be proved in this case. I don't know. I know generally what the facts are as I have been able to discover them through rather extensive discovery proceedings, and the primary product involved here is single-strength Valencia juice. Whether they dealt in that product in an amount in excess of that produced by themselves would depend I presume on a lot of the evidence produced in this case, which might raise a question of fact on which the Court might find it necessary to instruct the jury as to the

law on the third point, and let the jury determine if the evidence justifies it, whether that provision of the law was applicable.

But even those three provisions don't go to what I regard as the basic purpose here. If the third proposition or fact that Mr. Fisher just referred to were found against them, then they would be completely out as far as any exemption that they might have by reason of their being organized under the state laws for co-operatives or the federal act that might be applicable to them. But let's assume that all three of [22] those provisions are applicable, they are still not placed outside of the application of the antitrust laws under the evidence as we expect will be introduced in this case in support of the allegations of the complaint.

Mr. Fisher: We recognize that there is the Borden case, of course. I am not claiming that if you had a Borden case that the defendants would be exempt as to that transaction.

(b) Of this statement, "Exempt Position of Defendants," the statement "Instruct that exempt position may be lost by acts, conduct or contracts." I wouldn't concede that the exempt status of the defendants as non-profit co-operatives would be lost even were there a violation of the antitrust laws, by itself. I don't think your Honor intended that.

The Court: I don't know that we are talking about the same thing.

Mr. Fisher: I don't believe so.

The Court: They would still be non-profit co-

operatives, but if there was a violation of the anti-trust laws, they might be liable for damage.

Mr. Fisher: Expressed in that way, I think it is correctly stated, had you such a case.

The Court: I didn't prepare these notes for you gentlemen, to start with; I prepared them for myself and then I merely had the girl type them out and mail them to you, so they haven't been done artfully. [23]

Anything further on this No. 2 question, Mr. Fisher?

I am going to do some further work on it. I will be glad to have both of your views on it.

Will you have any matter on which you want to preserve your record as you go along?

Mr. Fisher: Yes, we would want to preserve our record to preserve this point.

The Court: You might give some attention to formulating some kind of a motion or objection which would raise this particular point so it wouldn't have to be raised every time a witness answered a question.

Mr. Stark: Your Honor, wouldn't it arise much as you have indicated at the time of instructions?

The Court: That is certainly when we will be up against the gun on it, at the time of instructions.

Mr. Stark: I wonder if I could go back just for a moment to clarify what I think may have been some misunderstanding on your question as to whether defendants relied on the third section of the Capper-Volstead Act for the Silzle and Tree-Sweet contracts.

I think what Mr. Fisher was stating was that the Silzle and TreeSweet contracts would be non-member business, and would be in the aggregate a part of the non-member business to be balanced against member business.

The third section as such I don't believe is relied on [24] for the legality or illegality of the particular contract. But I think the thing Mr. Fisher was trying to get at was just as a preliminary matter it is a rather obvious fact that Mr. Dixon in his discovery found that these corporations do comply to the extent that there is protection from the Capper-Volstead Act.

Mr. Dixon: Oh, yes.

Mr. Fisher: That is what I was trying to reach.

Mr. Dixon: Maybe I misunderstood you, Ross.

If there has been any misunderstanding, may the record show, your Honor, that I am not denying the fact that the defendants here are incorporated under the laws of California which provide for this type of organization, and so forth. If that is what you meant, Ross.

Mr. Fisher: And that——

Mr. Dixon: But that doesn't give you exemption from the antitrust laws is my position.

Mr. Fisher: But there is a compliance with the provisions of the Capper-Volstead Act, as far as the exemption provisions of that act would carry you.

I think what we are arguing about is how far the exemption provisions of the Capper-Volstead Act carry you.

The Court: I understand there is no restriction on your agreement except as to 3.

Mr. Dixon: That is correct, your Honor. [25]

The Court: I think you are talking the same language in maybe different words.

I am going to do some further work on this, but my present view is that this case will go to the jury on the proper instructions as to the status of these defendants on what would be legal and what would be illegal activities.

We will take up this question of the statute of limitations.

I had another work sheet that I handed to you. The original complaint was filed on February 1, 1952, and this amended complaint on December 14, 1954.

I understand the defendant's contention is that the matters in the amended complaint insofar as they refer to Silzle are without the statute of limitations, and not within the statutory period. Two affirmative defenses set up. The third relying on Section 338(1) CCP, and the fifth alleging some sort of laches and estoppel, which I will be very frank it is rather hard for me to follow. I couldn't make much out of the fifth affirmative defense.

My tentative view is that the original complaint alleged that the defendants contracted, among other things. Certainly the defendants knew they contracted. Any proceedings to find out what those contracts were was a matter of discovery, and in the matter of discovery the Silzle contract turned up, having been revealed apparently on May 26 in [26]

answers to interrogatories. And the Silzle contract has an amendment in it which was dated February 6, '52.

It is a very remarkable amendment, by the way, in that Sunkist agreed that Silzle may sell outside of California and Arizona a certain number of cases at a fixed price.

Here was an amendment to the contract in February of '52 with acts, I suppose the proof will show, done thereafter, and those acts are clearly within the statute of limitations. Although Silzle was not mentioned by name in the original contract, contracts were mentioned, and I suppose the only way the plaintiff can find out what contracts a private concern has is to engage in discovery.

I don't see any particular problem about the statute.

The amendment relates back, under the rules, to the date the original complaint was filed.

I want to compliment defendants on how diligently they found everything that I had ever written that had any possible bearing on this case. I even saw DeFranco pop up from Federal Rules Decisions Service.

Of course you haven't seen the case. If you looked at the case, rather than the Service, you would discover that I held that the amended complaint was proper, that no new theory was interjected into the case, and that it would lie.

Of course there the problem was more than naming of the parties. The same principle runs through

all these cases: [27] Was the defendant put on notice? And in these cases that involve different parties plaintiff you will find a distinction in the two situations. If you are changing a party defendant, well, you may be in trouble, because you have been proceeding against X and all of a sudden you want to get Y into the case who never knew about the lawsuit. But if it is a change of parties plaintiff, and the defendant knows from the beginning what the general cause of action was which the plaintiff was asserting, the mere fact that there is almost a complete change of parties plaintiff, as some of the cases cited in De Franco would indicate, isn't fatal.

So my tentative view is that the amended complaint is not subject to attack by the statute of limitations; that we will have a question of law and fact, when the case is completed, as to what was proved and what wasn't proved.

Who wants to talk about this?

Mr. Fisher: Your Honor, we have been over this ground somewhat before. I may want Mr. Williams to supplement what I have to say. First, with reference to the applicable period of time, the three-year statute governs.

I want to mention that for the reason that in chambers the other day your Honor, I think, raised the question as to whether perhaps the new four-year statute under the amendment made by Congress to the antitrust laws might govern. [28]

I may say in that regard that the Act of Congress was July 7, 1955. It provides that it shall not be-

come effective until January 7, 1956. It provides for the four years after the cause of action accrued. Then there is a statement: No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

I mention it simply to clear the way that it is, I think, the three-year statute which would govern.

The Court: All right.

Mr. Fisher: Now, I don't think that we dispute (b) of your paragraph 3, where you state "within three years from acts causing damage."

I think where we get into the dispute is about when does a cause of action accrue? And it has been our position that the cause of action, as stated in the statute, the injury, that it must necessarily arise under a complaint, and I am referring now to the original complaint, at the time that Winckler was refused the contract, at the time the contract was entered into with TreeSweet or Silzle and he wasn't given a like contract. That, if you please, was in mid summer of 1951. All right. There is no cause of action on account of the acts carrying out the contract. The cause of action arises in the inception, as I have stated.

The Court: Logically how could that happen? Supposing two people contracted but never did anything to carry out the [29] contract, how could you have any damage?

That seems to me to be a matter of logic. In other words, it is what is done under the contracts generally, rather than this question of when a contract was entered into, that gives rise to the damage.

Now, in your brief you talk about this case as if it rested upon the defendants' refusal to give Winckler a contract.

Maybe under the Clayton and Robinson-Patman Acts you do, but I don't think the Sherman Act violations have anything to do with that.

If that was all that there was in the case, that Winckler had asked for a contract and handn't gotten it, the plaintiff couldn't state a case here.

I take it that the plaintiff's case cuts deeper and wider across Sections 1 and 2 of the Sherman Act than mere refusal of the defendants to give Winckler a contract.

Am I stating plaintiff's position?

Mr. Dixon: Very well, your Honor.

The Court: All right.

Mr. Fisher: However, your Honor, if you refer to plaintiff's trial brief, pages 5, 19 and 20, it is quite clearly pointed out by him that it is the refusal to give Winckler the contract on which they rely.

The Court: There I think the matter being discussed— [30] I would have to check it—is the Clayton and Robinson Act violations.

It seems to me the Sherman Act violations rest on the contention that you gentlemen fixed prices with Silzle and TreeSweet. And that is where the heavy gravamen of plaintiff's charge is under the Sherman Act.

Mr. Fisher: Your Honor, according to my recollection there is no such charge, that we fixed prices, in the complaint.

Your Honor, I would like it if you would hear from Mr. Williams in furtherance of this point. We feel very strongly with respect to it.

The Court: All right.

Mr. Williams: Your Honor, at the moment I merely wanted to call the court's attention to the fact that the pages cited by Mr. Fisher are under the heading, "The violations of Sections 1 and 2 of the Sherman Act and the California Cartwright Act." The heading appears on page 17 of plaintiff's trial brief, and the discussion on pages 19 and 20, which were referred to, are still under that heading.

Further, the amended complaint alleges the refusal to enter into the contract specifically. I believe it is the last or next to the last paragraph of the first cause of action, which is the conspiracy. It is subparagraph (f) of the first cause of [31] action.

It states:

"Defendant EOP refused to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant Tree-Sweet and co-conspirator Silzle."

Mr. Dixon: May it please the court, there seems to be some confusion here as to what the position of the plaintiff is on this point, and I will therefore attempt to clarify it.

I endeavored to state our position on page 23 of our brief, in which I stated as follows:

"The discriminatory contracts between EOP

and the independent processors TreeSweet and Silzle"——

And I meant to infer there, necessarily, the performance of those contracts, also.

"——coupled with the refusal of EOP to enter into a comparable agreement"——

In other words, an agreeemnt under which oranges would have been made available to this plaintiff under comparable terms and conditions as those at which they were made available to TreeSweet and Silzle.

"——had the necessary purpose and effect of eliminating its competition in the single strength [32] California valencia juice market in 1951, * * *"

Now, the position of the plaintiff under Section 2 of the Sherman Act, which is primarily a monopoly section, as your Honor well knows, is directed to the abuse of the monopoly power, assuming it to exist here—and I think it does, and your Honor may instruct upon that point, or perhaps may decide to leave it to the jury, I don't know—but I am assuming in my discussion that they had the monopoly power, that if they abused the power—and they did abuse it, your Honor—under Section 2, by entering into these contracts, which gave TreeSweet and Silzle these discriminatory acts as to the single strength market. They were competitors of this plaintiff, and a refusal on the part of the defendants to make a comparable arrangement available to the plaintiff adds up to a violation of

Section 2 of the Sherman Act, wholly apart from any conspiracy charge that might also be made under Section 2 of the Sherman Act.

The Court: Wouldn't the charge lie whether or not Silzle had ever asked for a contract?

Mr. Dixon: Yes. You mean whether the plaintiff had asked for it?

The Court: Yes.

Mr. Dixon: I think so. Although I think that the fact that the plaintiff asked for one and was refused is further evidence of the intent on the part of these defendants to [33] eliminate the plaintiff here as a competitor, not only of the defendants, but also of the co-conspirators TreeSweet and Silzle, in the single strength market. And that is what happened, as a matter of fact.

Mr. Fisher: May the court please, we still get back, I think, to our fundamental proposition, and that is that the act causing injury was the refusal to give the contract during the 1951 season to the plaintiff.

That refusal was in the mid summer of 1951.

The Court: Mr. Dixon just told you, in response to my question, that had that never occurred, he would still contend that there was a cause of action under Section 2, and I suppose likewise under Section 1, in which event the injury would result, as I reason it out, from the time that acts were done under the TreeSweet and Silzle contracts; that it, therefore, had an impact on the plaintiff and damaged the plaintiff.

Mr. Fisher: Well, there must be an injury to

the plaintiff. That injury occurred, if there be an injury, at the time of the refusal to make the contract with Winckler.

The Court: Well, I am not in agreement. I will give you a further chance to write something out to set forth your position, but I am not in agreement on that.

I read one very excellent case. This Sherman Act and these Clayton-Robinson-Patman Act things seem to be very [34] complicated, and sometimes it seems to me that counsel and judges in writing and talking about them just make them more complicated. I read Judge Sugarman's decision in the trial court in the Interborough News vs. Curtis Publishing Company case, 127 Fed. Supp. 286. When you turn to the decision, it looks like it takes about 100 pages, don't be discouraged, because the preliminary parts of it have a lot of factual matter which is very similar as to the various defendants, and in the court's discussion the court talks enough about the facts so that you can understand what happened, and the guts of the decision runs from about 297 or 298 to about 301.

But there it seemed to me that Judge Sugarman did an excellent job in analyzing what was meant by a monopoly case and what was meant by a Section 1 case. His decision was a verdict to the plaintiffs, but he broke it down with simplicity.

If you haven't read it, I recommend it for your reading. I would like to see you try to break this thing down in the same way that he broke that one down.

Mr. Fisher: We will try to do so, because it is a point that we feel strongly about, and we want to preserve our record on it.

The Court: Does the plaintiff expect to show that there were acts done under the Silzle and TreeSweet [35] contracts within three years prior to December 14, 1954? That would be acts done on and after December 14, 1951.

Mr. Dixon: Yes, your Honor. For example, some of the sales that were made under that contract, of the defendants in this action, were made as late as February, 1952.

The Court: That is Silzle?

Mr. Dixon: Silzle, and TreeSweet as well. In other words, it was an inventory that was carried over on these contracts that was ultimately disposed of, and it was all disposed of at a price here which was impossible for anyone to meet.

The Court: Was it also disposed of at a price fixed by the defendants?

Mr. Dixon: That was the way the contract read. In other words, the selling price of that and the price at which they were sold, I think they are substantially the same, because there were very few sales that were not made at that price, as I understand it, was set forth in the contracts, or referred to by the Sunkist selling price—I mean their price list—and whenever these sales were made, depending upon the time at which they were made, and that is an important factor, they were geared to the market, the Sunkist selling price, they received the preferential discounts and various allowances

that were not made available to anyone else, including the plaintiff, and were not made [36] available to him under this contract.

The Court: The statute of limitations problem boils itself down into two parts. No. 1, there isn't any possible argument that even if this amended complaint is treated as a new complaint, that acts done in the three-year period from December 14, 1951, on are within the statute and can be proved, but that is a last ditch proposition for plaintiff.

The plaintiff's other contention is that the complaint relates back, and since it relates back to the date of the filing of the original complaint, the original complaint dictates the statute of limitations.

Now, that is the most reasonable interpretation to put on it as I read the cases.

And this other contention, that acts had to be done after December 14, 1951, is merely a last ditch proposition on plaintiff's part.

Mr. Fisher: We are approaching this on the question of whether it relates back.

The Court: You have the two problems.

Mr. Fisher: But the acts which were done in performance of the contract, they aren't the acts which caused the injury. In other words, the claim arose, if it did arise, early in '51.

The Court: Well, the original complaint was clearly within the statute of limitations, was it not? [37]

Mr. Fisher: I beg your pardon?

The Court: The original complaint was clearly within the statute of limitations, was it not?

Mr. Fisher: So far as TreeSweet was concerned, it was. Not so far as Silzle was concerned. Silzle was not mentioned in the original complaint.

The Court: If Silzle had been a defendant you might have some point. He would have had no notice that he was being sued for that matter. But Silzle is not a defendant. Silzle is one of the people that the plaintiff says you contracted with. It is just a matter of proof is all.

I can't see the emphasis you place on this, but I will tell you what I am going to do about it. I want to cover some other points and get your views.

Mr. Dixon: Pardon me, your Honor. May I make this further suggestion for what it is worth?

As the record shows, there were several John Doe defendants so-called, and Silzle was not made a defendant, but he was named a co-conspirator in this case when the amended complaint was filed. I say if any legal theory was necessary, they were put on notice that there were other parties and other acts that might have been performed, if that is necessary. I don't think it is necessary.

The Court: I will make the suggestion that on this statute of limitations each of you see how succinctly you [38] can write out what your position is.

Mr. Dixon: There is nothing further, your Honor, that I think that I can add to what I have already said.

The Court: I was going to say that since I am apparently dissatisfied with the defendants' con-

tention I think they should do that. I see no reason why you couldn't do that by Monday or Tuesday, a succinct statement of what your position is on the statute of limitations. Treat it two ways. In other words, assume the amended complaint dates back to the original complaint.

Of course, if that applies, you have no point. The only question then is what could be proved in that situation.

On the other hand, the amended complaint has to be effective as of the date of filing.

Your reasons why that would be true and what could be proved.

And if plaintiff is not satisfied that its position is made clear upon receipt of that, it may file a counter statement.

I am going to take a short recess. What other points would you like to discuss in the limited time that we have available?

Mr. Fisher: Are you asking me which ones?

The Court: I will ask you and I will ask Mr. Dixon.

Mr. Fisher: I take it that what has been said regarding [39] the statute of limitations applies to both 3, 4 and 5, is that correct?

The Court: Yes. My outline isn't very intelligible, but it seems to me there is no problem about the Silzle contract going into evidence, for the reason that an act done under it was done clearly within the statute. The only problem is whether the amended complaint dates back.

Certainly on another theory, acts done even without the statute would be admissible to show intent.

You have various rules that would apply.

So the problem is not the admissibility of the Silzle contract. But if you have a point. It is in connection with what things caused the injury, and I am not convinced that it was the execution of a contract. Certainly not by itself. So your statement had better cover 3, 4, and 5 of this outline.

Mr. Fisher: Yes. [40]

* * *

Mr. Stark: Yes, we probably should clarify the point that your Honor had in mind in No. 12, because I think that is based on a misunderstanding of what was in our brief.

The Court: All right, I will hear you after the recess on that.

Mr. Dixon, do you have some points that you want to discuss?

Mr. Dixon: I would like to comment on the monopoly phase of the case, which I think is going to be an important phase of this whole lawsuit.

Mr. Stark: We would like to suggest one other item that isn't on the sheet that your Honor furnished. It perhaps could be disposed of today.

Mr. Dixon indicated at the time of the last hearing on this matter that the plaintiff was considering dismissing the fourth and fifth causes of action. If possible, I thought that might well be taken care of today.

The Court: Yes.

That reminds me of another question. There must be pertinent issues that will come up in this case upon which I should do some work and we should have some discussion besides these that I have listed. Have either one of you made a further list of issues, or in my blundering way have I covered most of the hot spots of this case? [41]

Mr. Dixon: I would say you have.

Mr. Fisher: I have restricted my attention to trying to meet these.

The Court: You haven't been worried about what other issues there might be?

Mr. Fisher: I haven't had, really, the opportunity to consider what other issues there might be.

The Court: I wish you both would give some thought to that.

We will take a short recess and then I will hear you on these others.

(Recess taken.) [42]

The Court: Mr. Stark.

Mr. Stark: The first item, I don't believe, your Honor, requires anything extensive, except an explanation of what we understood by some of the language of our brief.

In point 12 on the memoranda you question the statement at page 8 of the defendants' brief,

"Plaintiff has failed to include any discussion in its trial brief of the charges made in the complaint that the defendants entered into 'contracts in re-restraint of trade.' It is assumed, therefore, that these charges have been abandoned * * *."

You have observed that, in a manner of speaking, this case turns upon contracts, and that therefore you wonder about that language that the plaintiff has abandoned the contracts.

What was meant by that was the term, "contracts in restraint of trade," that is a per se contract in restraint of trade, on its face, without any of the factual operation—what we had in mind was the fact that although the critical item of proof from the plaintiff's standpoint is going to be the proof of these contracts, that we come back again to the point that we have gone over quite a little today, that as we understand the matter, the cause of action, if any cause of action exists, is the damage which resulted to plaintiff by the refusal to grant him contracts. And the reference to the plaintiff having abandoned his claim of contracts in [43] restraint of trade was that in the original complaint it appeared that there might be a charge that these were, or that there were per se violations of contracts in restraint of trade.

The Court: Plaintiff doesn't say that in his brief, but if they fixed prices, they are per se violations, are they not?

Mr. Stark: The price fixing feature, I must say that until we received the memorandum we hadn't considered at any point in this case that there was a charge of price fixing, or any damage resulting from price fixing. And that feature of the case, so far as I am concerned, is completely new.

The Court: It might have two impacts on the case. One, it might be part of the general proof

that there was a public injury, a violation of the Sherman Act.

The second question is, does plaintiff or can plaintiff show any damage from the price fixing contracts?

I don't know what will appear on the latter part, but it seems to me—I may be wrong, but it seems to me fairly clear that those contracts and their price fixing features would be in the case under the general allegations of the Sherman Act, and I am amazed that you tell me that although you knew they had price fixing features you never considered that that feature had any impact on the case.

Mr. Stark: I didn't mean to say that I was aware of [44] price fixing features in the contracts. I am not presently aware of price fixing features in the contracts. Perhaps because I haven't looked at the contracts with that in mind. Whether they are or are not, or do or do not contain price-fixing features is something that I hadn't frankly reviewed. But at the time the brief was written that particular point hadn't been brought into focus as an element in the case.

In reviewing this I wanted to point out that we were not attempting to confuse the court or to set up a false issue, as we understood the thing there was no longer any allegation on which to base a charge of per se violation by reason of a contract in restraint of trade.

The other item in the memorandum that Mr. Dixon indicated he wanted to say something about

the conspiracy provisions, perhaps it would be best if he commented to the extent that he wanted to comment.

The Court: First, what is your view as to point 16, where I mention per se violations? Maybe I am injecting an issue in this case that doesn't belong here.

Mr. Dixon: Your Honor, in a conspiracy case, as your Honor well knows, a lot of facts necessarily come into the record. If the evidence here, cross-examination, would indicate, as I am inclined to believe that it will, that these contracts in operation resulted in the sales of the juice purchased thereunder by TreeSweet and/or Silzle at substantially the [45] same prices at which Sunkist was selling its product, then I think a question of fact might well be presented as to whether or not that was part of the conspiracy charged here in the complaint between the defendants and the co-conspirators in violation of Sections 1 and 2 of the Sherman Act.

Now, you always, of course, in a private lawsuit, have the question as to whether or not assuming that that act was illegal per se, and the jury so found under proper instructions, as to whether or not it contributed in any way, on the proximate cause angle, to the damage of the plaintiff. But certainly it would be competent evidence of the existence of an illegal combination of the type charged in the first and second causes of action, and admissible solely for that purpose to the same effect.

Let us assume that the evidence here shows a vio-

lation of the Robinson-Patman Act by direct discrimination in sales products to the plaintiff as against the sales made to Silzle and TreeSweet under their contract, I think that the jury might be entitled to consider—in other words, if they find that there is a violation, is it a part, also, of the conspiracy charged? It is a question of fact under proper instructions for the jury to determine. In other words, the jury is going to consider here all of the competent evidence. They are going to consider, perhaps, three particular situations.

One. Whether there was a conspiracy of the type charged [46] in the complaint;

Two. Whether there was an abuse of the monopoly power by the defendants under Section 2 of the Sherman Act, wholly apart from the conspiracy question;

Three. Whether or not the defendants or one of the defendants violated the Robinson-Patman Act in any manner.

Now, then, of course there is a charge made under the fourth and fifth causes of action of state violations, concerning which I have reserved comment or judgment at this time as to whether we will dismiss, but there again let us assume that the commerce question comes in as the defendants may well argue, it is suggested in their brief that there isn't and couldn't be any Robinson-Patman Act violations here because the sales made were in commerce. Now, the State law still would apply, if those sales intrastate contained a secret rebate, for example, which was given to TreeSweet and Silzle

and not available to this plaintiff. I think that type of evidence would be admissible, not necessarily to support a judgment of a violation of the unfair practices act of the State of California, but as evidence of the fact that the defendants here were engaged in a conspiracy and in the course of the conspiracy committed certain illegal acts which had the effect required by the Sherman Act to constitute a violation of that Act.

An antitrust case, as your Honor has suggested, particularly [47] a conspiracy type of case, depends 100 per cent, if that is possible, more than any other type of lawsuit, upon the facts and the evidence, of course, from which inferences can be drawn.

It is usually based on evidence from which inferences must necessarily be drawn, because there is a lack of direct evidence of the type necessary to constitute an affirmative violation of the law as such.

So in the conspiracy angle I think that type of evidence would be admissible to go to the jury on the question of whether or not they were engaged in the conspiracy of the type charged.

I don't think it is necessary to prove that the defendants committed all the acts charged in the conspiracy. It is only necessary to prove that the conspiracy existed, and that the defendants—or the plaintiff, rather, was damaged as a result of some act committed pursuant to that conspiracy.

There may be several acts, but that is again a question for the jury to determine which act or acts,

if any. But the primary question is for them to determine whether it was a conspiracy.

The Court: All right. Now do you want to comment on this monopoly question?

Mr. Dixon: Yes, your Honor. I don't think there is any question, I think the defendants must necessarily concede that [48] the defendants controlled—by "controlled" I mean they accounted for and had for disposition in the markets of the country — more than two-thirds of the Valencia oranges produced in the states of California and Arizona. It seems to me that fact cannot be seriously disputed, and I don't think that it is disputed.

I think the facts here and the evidence will also show that of the total amount of Valencias available during the 1951 processing season, that more than two-thirds of the amount available was under the control or disposition by the defendants. Therefore, I think we must assume and conclude that the defendants had monopoly control over the product, which was necessary for this plaintiff to remain in the single-strength juice and the related parts of the citrus juice business in Califorina during that year.

The same might be said of the lemons, only to a much greater extent. I think the percentage of control there was something like 87 per cent of the total production.

Of grapefruit it is not as high. It is around about, as I recall it, 50 per cent.

So that I don't think that we are directly concerned with the question whether there is a monopoly here in the sense that they have control over the product necessary for this plaintiff to function and remain in business.

It is true the balance of the Valencia oranges were in a [49] sense available, but there are other co-ops in this business, and they have their own arrangements, too, but they don't control in the sense that I have indicated the raw product here that is necessary for the processing of the citrus juice that is primarily involved in this case.

I would like to ask the defendants if they don't concede that they had that kind of control, at least as far as the production figures are concerned, because I am prepared to show that they do, if it is questioned.

Mr. Stark: Your Honor, to begin with, it is our position that we go about this wrong. If we go to what in a normal nonco-operative situation would be the middle step of finding out whether there is or is not a monopoly, Mr. Dixon's statement of facts was, I think, erroneous to begin with so far as he says that there are other co-operatives and other sources of supply, but they do not have the same kind of control. The ownership of fruit by the owners of co-operatives, whether it is Mutual Orange Distributors, Ventura, Coastal Lemon Company, American Fruit Growers, or others, is substantially identical.

The percentages that Mr. Dixon gave of the orange crop are generally correct, although they

are half of the story, because they are percentages of a portion, a minority portion of the fruit which is available for the national market. It excludes the entire Florida influence. But we feel that this goes back perhaps to the Robinson-Patman question, whether or [50] not there is liability for a co-operative is not going to turn on whether or not it is said that they have or do not have a monopoly. Monopoly, if it has any significance in that sense, cannot mean illegal monopoly. It must mean an economic monopoly.

We take the position that were there 100 per cent of the California-Arizona fruit in one co-operative organization, that it could still be a legal monopoly. Out of that control of fruit there grow certain obligations in the exercise of the power resultant from that control. When we come to the facts of this case, and it comes to submitting it to the jury, the court is going to have to determine whether or not those facts show that the defendants were in a position, did they have certain obligations, did they have an obligation to sell to everybody and anybody, or could they select their customers? Did they have to give processing contracts?

These are facts which will develop from the case and the testimony as to the industry, other sources of supply, the plaintiff's reliance on the defendants, but they don't go to a simplified question, is this a monopoly?

We don't feel that monopoly should be tied to a determination of a particular percentage.

But assuming it were, we don't believe that a

finding by the court or by the jury that the defendants are or are not a monopoly is going to be determinative, because whether they [51] are or are not a monopoly, if there is anything legal or illegal in itself is probably the one thing that is fairly clearly protected by the Capper-Volstead Act.

We don't think it does a great deal of good to determine as such that the defendants have a monopoly, because then you still have to proceed, if you assume that, do they have such a monopoly that they have an obligation to sell to everybody, or an obligation to give processing contracts to everybody?

Therefore we don't feel that, really, the inquiry should be phrased in terms of monopoly.

If I may for just one moment go back to the previous point.

I think Mr. Dixon's statement was generally in accord with our understanding at the time of our brief, and that was that as I understand him the contracts would be introduced as evidence relating to the conspiracy, perhaps evidence of acts relating to the conspiracy, but not as contracts illegal per se.

That was our understanding in writing the brief.

He mentioned just briefly a thing which has bothered us for some time, and that is, what the alleged purpose of the conspiracy was. I thought I got an indication that perhaps he feels the purpose of the conspiracy was to fix prices.

We have never gotten any definition, not of the acts pursuant to the conspiracy, but we have never

gotten a very clear definition of what the purpose of the conspiracy was, [52] what did these people supposedly agree to do. We would appreciate knowing that if Mr. Dixon has it readily at hand.

Mr. Dixon: If the court please, I sat down because I posed a question which I thought Mr. Stark would answer, after which I intended to take off from that point to further elaborate on the monopoly question.

I said I expect the evidence will clearly show here that under any percentage test applied by the courts, or any other rule that has heretofore been applied, that the evidence will show that as far as the product Valencia oranges is concerned that the defendants here, Sunkist and EOP, had that kind of monopoly control. We start from that premise, your Honor.

I concede the point that monopoly control under this type of organization may not necessarily be illegal. As Mr. Stark has suggested, they might have 100 per cent of the Valencia orange market and it might not be illegal. I grant that. But that isn't the evidence and the charge made in this case.

We start from the fact that the plaintiff here is an independent processor of citrus juices. He is not a producer of the product. He depends upon the defendants and other growers for the product which he must have to remain in the citrus juice business in this area, and there are a few others, and he went into business relying on that fact, and the record will show, your Honor—I mean the evidence will

show—that the defendants always had a surplus of Valencia oranges which [53] were made available to the market for independent processing by independent processors. They had control of what happened to them, and that is where this case begins to jell. Abuse of the monopoly control or power. What did they do with it?

They made these contracts. I am not going to go into them now, unless your Honor wants me to. I have referred to them, and the effect of them in the brief. But they made these contracts. The plaintiff didn't know about them at the time. He asked for a contract or an arrangement, knowing there must be one with the others, that would enable him to have access to the raw product fruit, so that he could process juice as his competitors were doing, and continue to supply the market that this company had built up over a five or six year period.

The evidence will show that in 1949 and '50, in other words, before '51, plaintiff corporation had sales in excess of one million and a quarter dollars in all citrus products, that they made a profit.

Now, the abuse of the monopoly power is the thing that I am getting at, because it is not based upon conspiracy. Of course it could be. But the cases clearly indicate, in my judgment, that even if you have a legal monopoly, it doesn't make any difference how you get it, if you have a monopoly, and you abuse the monopoly power with the purpose and effect of injuring competition, or of restraining competition, that [54] you violate Section 2 of the Sherman Act.

The cases that I have cited in my brief, I believe, support that proposition. And that is going to be my contention in the trial of this case with reference to the application of Section 2 of the Sherman Act to these contracts and all the other evidence, the effect of them on the plaintiff, and so forth.

Now, it may not have been necessary to make a demand on the defendants here for a comparable arrangement, but that demand was made, and it was refused, which is additional evidence, coupled with the other contracts, of the discriminatory practices of these defendants, of their intent insofar as any legal intent is required, and it doesn't have to be a specific intent—of an intent to eliminate competition or restrain trade and commerce in citrus juices that are produced and processed in California and sold in commerce.

I have made rather an extensive statement of the position of the plaintiff here on this point, because it is the position that I expect to argue and urge in the trial of this case. I am satisfied that it is soundly based on the law, and that it doesn't make any difference under the law whether this monopoly is legal or illegal insofar as the plaintiff is concerned. But the law is that legal or illegal you can't abuse the monopoly power that you have if the effect of that abuse is to eliminate competition or to damage a competitor. [55]

And these contracts here, there again, were made by the defendants with their competitors, supposedly, with competitors that were competing with

the plaintiff, as well as with the defendants, so it goes around in a circle.

I submit that the clarification of the monopoly charge insofar as it may be applicable to this case is based upon the facts, statements that I have made, and that it does have an important part in this case. In addition to the conspiracy charge, which is also, of course, a question of fact for the jury to determine. But the monopoly charge, the abuse of the monopoly power does not depend—and this is the point that I want to suggest to your Honor—does not depend upon the conspiracy phase of the charges made in the complaint.

Mr. Stark: This statement of Mr. Dixon, your Honor, has been very helpful to us. It is the type of thing that we have been trying to get on the Section 1 and Section 2 charges. This is, I think, the best statement that we have had on the monopoly phase, and I don't know that we disagree with the law. We just are satisfied that he can't find the facts for it.

But I would very much appreciate it if we could have comparable clarification as to the purpose of the conspiracy charge under Section 1. Is the conspiracy a conspiracy to abuse the monopoly power, or is it a different conspiracy?

This is something that in earlier stages perhaps the plaintiff couldn't clarify, but it seems to me that two or [56] three days before trial he should have a pretty good idea of what the illegal purpose of this supposed conspiracy was.

The Court: I don't know, I will ask Mr. Dixon.

but the complaint alleges that the defendants contracted, combined and conspired to tend to eliminate plaintiff from the market, and combined and agreed to have defendants TreeSweet, EOP, ELP, purchase fruit from defendant Sunkist below Sunkist's scheduled price, and maybe other allegations.

Mr. Dixon.

Mr. Dixon: Your Honor, I think the complaint speaks for itself. I don't know what I could add to it. It seems to me it is perfectly clear. I don't know what isn't clear in the minds of the defendants with reference to the charges made. It is a conspiracy to restrain and eliminate competition and to monopolize the citrus juice market, of citrus juices processed here in California and sold in California and interstate markets.

It is just as simple as that.

The Court: In the interstate markets?

Mr. Dixon: And interstate markets, yes.

Plaintiff was engaged in interstate commerce.

The Court: I don't have the difficulty the defendants do as to Count One. Count Two, I have been aided by what has been said. The gist of Count One is not merely a conspiracy to violate the antitrust laws. That would give no cause of [57] action. It is a conspiracy to violate the antitrust laws and thereby injure the plaintiff.

How?

By tending to eliminate him from the market, and by entering into contracts which hurt him, which contracts were performed.

Is that what your complaint says?

Mr. Dixon: That is correct, your Honor.

And I may add, by way of comment in that respect, that you probably read a lot of decisions on Sections 1 and 2, where 1 and 2 counts are charged. If I had drawn this complaint originally, I wouldn't have drawn it as Count One and Count Two, your Honor, because the cases indicate and refer frequently to the fact that an abuse of monopoly power may restrain competition in violation of Section 1. In other words, if you have monopoly power and you abuse it, with the result of restraining trade and commerce or eliminating competition, Section 1 of the Sherman Act makes elimination of competition and restraining of competition in interstate commerce a violation. Section 2 merely says monopoly power and conspiracy to monopolize and attempt to monopolize—— [58]

* * *

The Court: Counsel for the defendants indicates that maybe these percentage figures you gave were correct, but he contends there was no monopoly but a legal monopoly. Mechanically how do you do this? Do you instruct a jury that if they find—do you leave it to the jury wide open, if you find there has been a monopoly or attempt to monopolize, and so forth? Or do you give them a numerical figure percentagewise, or do you rule as a matter of law that the evidence is sufficient and then leave it to them to determine as to whether there has been the damage from the Section 2 charge?

Mr. Dixon: Your Honor, I naturally expected

we would go to trial some time before we are going to trial, so I therefore prepared some requested instructions to the jury. I know they are not technically in order now, but I will be glad to file them and submit them to the court. I think it will clarify or answer perhaps some of the questions that you have asked of me on this point.

If you would like me to file them now I would be glad to do so. [59]

The Court: You may file them. [60]

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December 13, 1955; 9:45 A.M.

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Mr. Fisher: Mr. Williams has a motion.

Mr. Williams: We have already submitted to your Honor and to Mr. Dixon our written motion to dismiss the fourth and fifth causes of action, upon the ground that this court has no jurisdiction to entertain them.

The Court: Mr. Dixon.

Mr. Dixon: I think, Judge, to clarify the issue we may as well dismiss the fourth and fifth causes of action. I think we can bring in rebates which we claim were granted under the contract, under the Robinson-Patman Act provision.

The Court: The motion is granted.

The Clerk: The formal order, I suppose, would be incorporated in the final judgment in the case?

The Court: Unless you want it filed earlier.

The Clerk: We don't need a separate one unless counsel want one. [27]

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The Court: It is my general view that absent the Silzle and TreeSweet contracts, defendants have no obligations to sell to anybody. It then becomes a question of fact if the Silzle and TreeSweet contracts are believed by the jury to create a certain situation, then it may well be the defendants did have some obligation.

Certainly they had no obligation to sell to anybody, absent those contracts.

Mr. Dixon: That is our position, Judge.

The Court: In other words, there is no law saying you have to sell to anybody.

Mr. Dixon: We would not be here were it not for the Silzle and TreeSweet contracts. [34]

The Court: That it seems to me is a question of fact. If the jury finds there were these contracts, and that they had an impact on interstate commerce, either under Section 1 or 2, then it seems to me that the refusal to sell becomes material.

That is my analysis of it after studying the case.

I think you are certainly right that without things like the Silzle and TreeSweet contracts, Winckler could have gone around and stood on their front door with his hat in his hand forever and there would have been no obligation to sell to him.

It is only the combination of the circumstances that would make that material. It still is a question of fact for the jury. [35]

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